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Chronological List of Relevant Docket Entries.

JAMES ROYSTER, et-ano vs. PAUL D. MCGINNIS, Commissioner of Correction, et al.

DATE 70 CIVIL 4365	PROCEEDINGS 70 CIVIL 4365
Oct 8-70	Filed Complaint. Issued Summons.
Oct 8-70	Filed Motion to proceed in FORMA PAUPERIS
Oct. 13-70	Filed summons with marshal's ret. Served all 3 defendants through Attorney General on 10/8/70.
Oct. 27-70	Filed Notice of Motion re: 3-Judge Court. Ret. 11/10/70 and affidavit of service by mail.
Nov. 10-70	Filed Memorandum of Law. (filed in court).
Nov. 10-70	Filed (in court) Memorandum of Law for Defendants.
Jan. 21-71	Filed OPINION #37348. Plaintiffs' application for the convening of a 3-judge court is granted. It is so ordered. Lasker, J. (mailed notice).
Jan. 25-71	Filed ORDER designation judges in addition to the Honorable Morris E. Lasker to hear and determine this cause as provided by law: Hon. Paul R. Hays, U.S.C.J., Hon. Charles M. Metzner, U.S.D.J. Friendly, Acting Chief Judge. U.S.C.A. 2nd Cir.
Feb. 1-71	Filed Order that a hearing in this matter shall be held on Wednesday, 3-3-71, at 4:00 p.m. in Courtroom 110, Ordered that the parties shall submit memoranda and such other papers as they elect on or before Wednesday, 2-17-71, and that the originals of all papers submitted shall be filed with the Clerk of this Court and copies thereof delivered to each member of the three judge court at his chambers. Lasker, J.—mailed notices.

Chronological List of Relevant Docket Entries.

DATE	PROCEEDINGS
70 CIVIL 4365	70 CIVIL 4365
Feb. 3, 71	Filed Statutory Notice with return receipts.
Feb. 17-71	Filed Memorandum of Law for Defendants.
Feb. 23-71	Filed Opinion #37863: The New York correction law, insofar as it denies, good time credit for jail time to indeterminate sentence prisoners, in the computation of their minimum release dates, is hereby, declared unconstitutional, & deft's will be permanently enjoined, & restrained from enforcing it so as to deny such credit to pltff's & members of their class. The class is defined to include all, prisoners who are presently serving indeterminate sentences in state prison for offenses committed prior to Sept 1, 1967, who served, time in county jail prior to trial & sentence to state prison, who, have not yet reached their minimum release date, and who have not as yet elected the conditional release program under 230-a of the correction law. Submit decree on notice. Metzner, J. Lasker, J. & Hays, Circuit Judge, dissenting.
Oct 14 71	Filed ORDER that Sec 230 (3) of the NY Correction Law, insofar as it denies good time credit for jail time to indeterminate sentence prisoners in the computation of their minimum release dates, is hereby declared unconstitutional, and further ordered that Defts Paul D McGinnis, Harry Fritz and J. L. Casscles as Wardens are permanently enjoined and restrained as indicated. Ordered that the declaration of a class action is hereby granted, the class defined to include all prisoners who are presently serving indeterminate sentences in state prison for offenses committed prior to 9-1-67 who served time in county

Chronological List of Relevant Docket Entries.

DATE	PROCEEDINGS
70 CIVIL 4365	70 CIVIL 4365
	jail prior to trial and sentence to state prison, who have not yet reached their minimum release date, and who have not as yet elected the conditional release program under Sec 230-a of the Correction Law & further ordered that the mandate of this Court be stayed pending the disposition of defts' appeal to the U. S. Supreme Court provided that said relief be sought within 30 days of the order granting the stay or within such time as may be granted by the Supreme Court upon application to that Court for a further stay. Metzner J. Lasker, J. MEMO ENDORSED on this Order —"Although I dissent from this decision of the Court in this case, I join in the order as correctly representing that decision. Paul R Hays, U.S.C.J. Judgment entered—Clerk. (mailed notices)
Oct 27 71	Filed Affdvt. of G. Jeffrey Sorge, atty for pltffs, in opposition to portion of deft's proposed order requesting a stay in the mandate of this Court.
Nov 15-71	Filed ORDER that the mandate of this Court is stayed pending disposition of defts appeal to US Supreme Court provided that said relief be sought by 11-26-71 or within such times as may be granted by Supreme Court upon application to that Court for a further stay—Hays, C.J., Metzner, D.J., Lasker, D.J.
Nov 12 71	Filed Deft's Notice of Appeal $5.00 from the final order entered 10-14-71, to the Supreme Court of the U.S. Mailed copy
Apr 5 72	Filed ORDER that the record of the case on file in the U.S.D.C. is hereby certified and transmitted, in the original, to the Clerk of the U.S. Supreme Court. Lasker, j. m/n

Summons.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT—NEW YORK.

JAMES ROYSTER, PERCY RUTHERFORD, and all other perso similarly situated,

Plaintiff

against

PAUL D. McGINNIS, Commissioner of Correction, State New York, HARRY FRITZ, Warden, Auburn Pris Auburn, N. Y., J. L. CASSCLES, Warden, Ossining Co rectional Facility, Ossining, N. Y.,

Defendant

TO THE HON. LOUIS LEFKOWITZ, Attorney-General for th State of New York, counsel for the above-named defend ants:

You are hereby summoned and required to serve upo James J. McDonough, plaintiffs' attorney, whose addres is 262 Old Country Road, Mineola, N. Y., an answer to th complaint which is herewith served upon you, within twenty (20) days after service of this summons upo you exclusive of the day of service. If you fail to do s judgment by default will be taken against you for th relief demanded in the complaint.

JOHN LIVINGSTON
Clerk of Court
Deputy Clerk

Dated:

This Summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

Complaint.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JAMES ROYSTER, PERCY RUTHERFORD, and all other persons similarly situated,

Plaintiffs,

against

PAUL D. MCGINNIS, Commissioner of Correction, State of New York, HARRY FRITZ, Warden, Auburn Prison, Auburn, N. Y., J. L. CASSCLES, Warden, Ossining Correctional Facility, Ossining, N. Y.,

Defendants.

The plaintiffs, by JOEL ZIEGLER, Esq., an attorney associated with James J. McDonough, Attorney in Chief, Legal Aid Society of Nassau County, New York, complaining of the defendants, respectfully alleges:

1. The jurisdiction of this court is invoked pursuant to the provisions of Title 28, United States Code, Section 1343.(2), this being a suit in equity which is authorized by law, Title 42, United States Code, Section 1983, to be brought to redress the deprivation under color of state law, statute, ordinance, regulation, custom, or usage of rights, privileges, and immunities secured by the Constitution of laws of the United States or by any Act of Congress providing for equal rights of citizens. The rights here sought to be redressed are rights guaranteed by the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States and Title 42, United States Code, Section 1983, as hereinafter more fully appears. The convocation of a three-judge District Court pursuant to 28 U.S.C. §§ 2281, 2284 is

sought to consider the allegations of unconstitutionality and enjoin enforcement of the state statute in question.

2. This is a class action brought by plaintiffs, on behalf of themselves and others similarly situated, for the purpose of having declared unconstitutional, and to enjoin enforcement of Section 230 (3) of the New York Correction Law which has the effect of requiring persons sentenced to state prisons for like terms of imprisonment to serve different terms of institutional incarceration depending on whether they happen to have been incarcerated in county jails pending receipt in state prison. The class on behalf of whom this action is brought is so numerous that joinder of all members is impractical; there are questions of law or fact common to the class which predominate over any questions affecting only individual members; the claims of the plaintiffs are typical of the class; the plaintiffs will fairly and adequately protect the interests of the class; and defendants have acted on grounds generally applicable to the class, thereby making appropriate final relief with respect to the class as a whole.

3. Plaintiffs, James Royster and Percy Rutherford, are citizens of the United States and inmates of Auburn Prison, Auburn, New York and Ossining Correctional Facility, Ossining, New York, respectively. Each of the plaintiffs and other members of the class on whose behalf this action is brought, has served a term of incarceration in a county jail prior to their conviction for various crimes, to wit:

Plaintiff Royster served 404 days in the Nassau County Jail prior to being sentenced to two consecutive five to ten year terms for Burglary in the third degree and Grand Larceny in the first degree.

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laintiff Rutherford served 242 days in the Nassau nty Jail prior to being sentenced to concurrent terms en to twenty years for Robbery in the first degree, two one-half to five years for Grand Larceny in the second ree, and a suspended sentence for Assault in the third ree (2 counts).

Defendant Paul D. McGinnis is the New York State mmissioner of Correction and defendants Harry Fritz J. L. Casscles are wardens of Auburn Prison, Auburn, York and Ossining Correctional Facility, Ossining, York, respectively.

Section 230(3) of the New York Correction Law di- s the population of the state correctional institutions several categories and permits or denies them the t to earn good time credit against their sentences. With ect to plaintiffs, who have received indeterminate sen- es, they may earn good time credit against the mini- n term of detention, but the statute specifically pro- bes the granting of such good time credit to prisoners tate prisons for "jail time" by stating that such credit l be allowed against the sentence imposed by the court s jail time allowance."

The classifications made by the statute and the dis- tions engendered are unconstitutionally arbitrary and icious and violate the provisions of Section 1 of the rteenth Amendment to the Constitution of the United es in the following respects:

a) This statute places the poor and disadvantaged, who unable to post bail prior to their conviction, on an qual footing with those persons who serve no term of onviction incarceration, by virtue of their ability to a bail bond.

(b) Assuming two persons, one indigent and the other rich, are charged with identical crimes and receive identical sentences, the indigent prisoner who spends his preconviction time in a county jail serves a total period of incarceration which is longer than that which is served by the prisoner who could afford to obtain bail while awaiting sentencing. Indigent prisoners thus receive increased punishment as a result of their poverty. Plaintiff Royster, because of his indigence and inability to make bail upon arraignment, is required to serve over four additional months in both county jail and state prison before becoming eligible to appear before the state board of parole for the first time, with the possibility of then securing release from prison. Plaintiff Rutherford must serve nearly three additional months.

(c) The statutory scheme serves to needlessly encourage guilty pleas for crimes where the penalty is relatively short, thereby allowing a prisoner to avail himself of the good time provision and be released from prison earlier, in many cases, than if he had gone to trial and been acquitted.

7. Plaintiffs allege that they have no plain, speedy, or adequate remedy at law; and that plaintiffs are suffering great and irreparable damage, for the aforesaid reasons alleged.

WHEREFORE, plaintiffs pray:

A. That the court decree that Section 230(3) of the New York Correctional Law is unconstitutional and void in its application to said plaintiffs in that it denies them equal protection of the law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States and Article 1, section 11 of the Constitution of the State of New York.

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3. That a permanent injunction be issued by said court
er trial of this action upon the merits before said court
petually enjoining and restraining the defendants from
orcing against plaintiffs the provisions of said statute.

4. For such other and further relief as this court may
m just.

Respectfully submitted,

JAMES J. McDONOUGH
Attorney for Plaintiffs
Attorney in Chief
Legal Aid Society of Nassau
County, N. Y.
Criminal Division
County Court House,
Mineola, New York

Counsel:

MATTHEW MURASKIN
JOEL ZIEGLER

CLOSE IN CENTER

Motion to Proceed in Forma Pauperis

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

No. .....

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

JAMES ROYSTER, PERCY RUTHERFORD, and all other persons similarly situated,

Plaintiffs,

against

PAUL D. MCGINNIS, Commissioner of Correction, State of New York,

HARRY FRITZ, Warden, Auburn Prison, Auburn, N. Y.,

J. L. CASSCLES, Warden, Ossining Correctional Facility, Ossining, N. Y.,

Defendants.

Plaintiffs, James Royster and Percy Rutherford move this court pursuant to 28 U.S.C. Section 1915 for permission to proceed in forma pauperis in filing the attached complaint. Affidavits in support of this motion are attached hereto.

JAMES J. MCDONOUGH
Attorney for Plaintiffs
Attorney in Chief
Legal Aid Society of Nassau County, N. Y.
Criminal Division
County Court House,
Mineola, New York

Of Counsel:
MATTHEW MURASKIN
JOEL ZIEGLER

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ffidavit of Percy Rutherford, in Support of Motion to Proceed in Forma Pauperis.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

PERCY RUTHERFORD, and all other persons similarly situated,

Plaintiffs,

against

J. L. CASSCLES, Warden, Ossining Correctional Facility, Ossining, N. Y.

I, PERCY RUTHERFORD, being duly sworn, according to w, state in support of my attached Motion to Proceed in orma Pauperis.

(1) I am the Plaintiff in the above-entitled case.

(2) I am, because of my poverty, unable to pay the costs of this case.

(3) I am unable to give security for it.

(4) I believe in good faith that I am entitled to the relief I am seeking.

(5) The nature of this case, briefly stated, is as follows.

I believe that I have been unconstitutionally denied, al-ough otherwise entitled to, credit against my sentence r good conduct and efficient and willing performance of ties assigned ("good time" credit) in respect to jail time der subdivision 3 of Section 230 of the Correction Law the State of New York.

Sworn to by Percy Rutherford on September 17, 1970.)

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Affidavit of James Royster in Support of Motion to Proceed in Forma Pauperis.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JAMES ROYSTER, and all other persons similarly situated,

Plaintiffs,

against

JOHN T. DEEGAN, Warden, Auburn Prison, Auburn, N. Y.

I, JAMES ROYSTER, being duly sworn, according to law, state in support of my attached Motion to Proceed in Forma Pauperis.

(1) I am the Plaintiff in the above-entitled case.

(2) I am, because of my poverty, unable to pay the costs of this case.

(3) I am unable to give security for it.

(4) I believe in good faith that I am entitled to the relief I am seeking.

(5) The nature of this case, briefly stated, is as follows.

I believe that I have been unconstitutionally denied, although otherwise entitled to, credit against my sentence for good conduct and efficient and willing performance of duties assigned ("good time" credit) in respect to jail time under subdivision 3 of Section 230 of the Correction Law of the State of New York.

(Sworn to by James Royster on September 18, 1970.)

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Statutory Notice.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

70 CIVIL 4365

MES ROYSTER, PERCY RUTHERFORD and all other persons similarly situated,

Plaintiffs,

against

UL D. MCGINNIS, Commissioner of Correction, State of New York, HARRY FRITZ, Warden, Auburn Prison, Auburn, New York, J. L. CASSCLES, Warden, Ossining Correctional Facility, Ossining, New York,

Defendants.

S:

Pursuant to the provisions of Title 28, United States de, Sections 2281 and 2284, you are hereby notified that an order dated January 29, 1971, made by the Honorable rris E. Lasker, a hearing has been set by a three-judge rt composed of the Honorable Paul R. Hays, United tes Circuit Judge, the Honorable Charles M. Metzner d Honorable Morris E. Lasker, United States District dges, for the 3rd day of March 1971, at 4:00 p.m. in urtroom 110, United States Court House, Foley Square, w York, New York.

Counsel are directed to comply with the provisions of neral Rule 25 of this Court and with the provisions conned in the order dated January 29, 1971, signed by the norable Morris E. Lasker, a copy of which order is eto annexed.

Dated: New York, New York, February 2, 1971.

JOHN LIVINGSTON
Clerk of the Court

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Statutory Notice.

To:

Attorney for Plaintiffs

James J. McDonough, Esq.
Legal Aid Society of Nassau County, N. Y.
County Court House
Mineola, New York

Attorney for Defendants

Hon. Louis J. Lefkowitz
Attorney General of the State of New York
80 Centre Street
New York, New York

Samuel A. Hirshowitz, Esq.
Michael Colodner, Esq.
of Counsel

70 Civil 4365

Hon. Nelson A. Rockefeller
Governor of the State of New York
Executive Mansion
Albany, New York

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Order of United States District Court, dated January 29, 1971.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

70 CIV. 4365

JAMES ROYSTER, PERCY RUTHERFORD and all other persons similarly situated,

Plaintiffs,

against

PAUL D. MCGINNIS, Commissioner of Correction, State of New York, HARRY FRITZ, Warden, Auburn Prison, Auburn, New York, J. L. CASSCLES, Warden, Ossining Correctional Facility, Ossining, New York,

Defendants.

It appearing that by an order dated January 25, 1971, the Honorable Henry J. Friendly, Acting Chief Judge of the United States Court of Appeals for the Second Circuit, designated the Honorable Paul R. Hays, United States Circuit Judge, the Honorable Charles M. Metzner, District Judge, and the undersigned to hear and determine this cause, it is

ORDERED that a hearing in this matter shall be held on Wednesday, March 3, 1971, at 4:00 p.m. in Courtroom 110, United States Court House, Foley Square, New York, New York; and it is further

ORDERED that the parties shall submit memoranda and such other papers as they elect on or before Wednesday, February 17, 1971, and that the originals of all papers sub-

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mitted shall be filed with the Clerk of this Court and copies thereof delivered to each member of the three-judge court at his chambers.

Dated: New York, N. Y.
January 29, 1971

MORRIS E. LASKER
Morris E. Lasker
United States District Judge

Attorney for Plaintiffs in 70 Civ. 4365:

James J. McDonough, Esq.
Legal Aid Society of Nassau County, N. Y.
County Court House
Mineola, New York

Attorney for Defendants in 70 Civ. 4365:

Hon. Louis J. Lefkowitz
Attorney General of the State of New York
80 Centre Street
New York, New York

Samuel A. Hirshowitz, Esq.
Michael Colodner, Esq.
of Counsel

Hon. Nelson A. Rockefeller
Governor of the State of New York
Executive Mansion
Albany, New York

Affidavit of Deputy Commissioner John R. Cain.

STATE OF NEW YORK
COUNTY OF ALBANY } ss.:

JOHN R. CAIN, being duly sworn, deposes and says:

I am a Deputy Commissioner in the Department of Correction and make this affidavit in connection with the computation of time in the case of Percy Rutherford, Ossining Correctional Facility #138399.

Section 230 of the New York Correction Law provides that a state prisoner may receive "for good conduct and efficient and willing performance of duties assigned", a reduction in sentence. This credit is generally referred to as "good time".

The statute provides that with respect to inmates of facilities serving an indeterminate sentence the reduction in time "shall be computed upon the minimum term of such sentence, less jail time allowance". In accordance with this statute the computation of an inmate's "good time" is made beginning with his receipt in the facility. According to the records of the Department of Correction of the State of New York, the computation of Mr. Rutherford's sentence is as follows:

Affidavit of Deputy Commissioner John R. Cain.

RE: Percy Rutherford
SS-138399

Robbery 1st 10—0—0/20—0—0
Grand Larceny 2nd— 2—6—0/5 —0—0 concurre

10—	0—	0	Minimum Term
	8—	2	Jail Time
9—	3—28		Minimum less jail time
3—	1—	9	compensation earned
6—	2—19		Term less compensation
66—	11—	4	Date Received
73—	1—22		Minimum date
20—	0—	0	Maximum Term
	8—	2	Jail Time
19—	3—28		Balance
66—	11—	4	Date Received
86—	3—	1	Maximum Expiration date
6—	8—	0	Time Earned
79—	7—	1	Conditional Release Date
86—	3—	1	Maximum Expiration date
3—	4—	0	Time Earned
82—	11—	1	Statutory Release Date

The actual allowance of "good time" is discretionary and is awarded as an incentive for good conduct. It is a means for encouraging participation in programs, efficient work and discipline.

The state correctional system seeks to encourage rehabilitation by work participation by inmates, job training programs and education programs. An inmate can be evaluated in his work and participation in the facility's programs and "good time" granted as an incentive. Prior to being received in the facility, however, an inmate who is in jail is not under the supervision of the State Correction Department and is not involved in the facility program. Since the inmate is not participating in the state programs while in jail there is no opportunity to evaluate him nor need to encourage his participation.

Our facilities are part of the state correction facilities and serve a three-fold capacity with respect to convicted prisoners: They provide the means of imposing the punishment or sentence imposed by the Court; they serve to protect society by segregating and restraining the individual; and they attempt to rehabilitate the inmate. Jails on the other hand serve to provide only the purpose of restricting a prisoner prior to his conviction.

For the reasons mentioned above, the deduction of jail time in determining "good time" is reasonable and logical:

1. Jail and correctional facilities and purposes are different.
2. "Good time" is awarded as an incentive to inmates participating in the State Correction system and under its supervision.

In the computation of the term of Mr. Rutherford, his maximum release date is shown as is his statutory release

date and his conditional release date. To the present time, Mr. Rutherford has not requested consideration for conditional release.

WHEREFORE, it is respectfully requested that the complaint herein be dismissed.

(Sworn to by John R. Cain, October 23, 1970.)

STATE OF NEW YORK }
COUNTY OF ALBANY } ss.:

JOHN R. CAIN, being duly sworn, deposes and says:

I am a Deputy Commissioner in the Department of Correction and make this affidavit in connection with the computation of time in the case of James Royster, Auburn Correction Facility #59875.

Section 230 of the New York Correction Law provides that a state prisoner may receive "for good conduct and efficient and willing performance of duties assigned", a reduction in sentence. This credit is generally referred to as "good time".

The statute provides that with respect to inmates of facilities serving an indeterminate sentence the reduction in time "shall be computed upon the minimum term of such sentence, less jail time allowance". In accordance with this statute the computation of an inmate's "good time" is made beginning with his receipt in the facility. According to the records of the Department of Correction of the State of New York, the computation of Mr. Royster's sentence is as follows:

Affidavit of Deputy Commissioner John R. Cain.

ames Royster, #59875
DCI-971581-X

he calculation of the subject's sentences is as follows:

BURGLARY 3RD

	Minimum	*Maximum*
ce	5— 0— 0	10— 0— 0
erm	1— 1— 9	1— 1— 9
less jail time	3—10—21	8—10—21
le good time	1— 3—17	
less good time	2— 7— 4	

GRAND LARCENY 1ST

ce	5— 0— 0	10— 0— 0
ime	1— 1— 9	1— 1— 9
less jail time	3—10—21	8—10—21
le good time	1— 3—17	
less good time	2— 7— 4	

COMBINED CONSECUTIVE SENTENCES

ry 3rd	2— 7 —4	8—10—21	
Larceny 1st	2— 7— 4	8—10—21	
ined term	5— 2— 8	17— 9—12	
ed in prison	1966— 5—26	1966— 5—26	
um parole date	1971— 8— 3	1984— 3— 7	Maximum expiration date
		6— 8— 0	
		1977— 7— 7	Conditional Release date
		1984— 3— 7	Maximum expiration date
		3— 4— 0	
		1980—11— 7	Statutory Release date

Affidavit of Deputy Commissioner John R. Cain.

The actual allowance of "good time" is discretionary and is awarded as an incentive for good conduct. It is a means for encouraging participation in programs, efficient work and discipline.

The state correctional system seeks to encourage rehabilitation by work participation by inmates, job training programs and education programs. An inmate can be evaluated in his work and participation in the facility's programs and "good time" granted as an incentive. Prior to being received in the facility, however, an inmate who is in jail is not under the supervision of the State Correction Department and is not involved in the facility program. Since the inmate is not participating in the state programs while in jail there is no opportunity to evaluate him nor need to encourage his participation.

Our facilities are part of the state correction facilities and serve a three-fold capacity with respect to convicted prisoners: They provide the means of imposing the punishment or sentence imposed by the Court; they serve to protect society by segregating and restraining the individual; and they attempt to rehabilitate the inmate. Jails on the other hand serve to provide only the purpose of restricting a prisoner prior to his conviction.

For the reasons mentioned above, the deduction of jail time in determining "good time" is reasonable and logical:

1. Jail and correctional facilities and purposes are different.

2. "Good time" is awarded as an incentive to inmates participating in the State Correction system and under its supervision.

In the computation of the term of Mr. Royster, his maximum release date is shown as is his statutory release

Affidavit of Deputy Commissioner John R. Cain.

ate and his conditional release date. To the present time, Ir. Royster has not requested consideration for condi-ional release.

WHEREFORE, it is respectfully requested that the com-laint herein be dismissed.

(Sworn to by John R. Cain, October 23, 1970.)

Opinion of the United States District Court Convening Three Judge Court, dated January 21, 1971.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

70 CIV. 4365

JAMES ROYSTER, PERCY RUTHERFORD and all other persons similarly situated,

Plaintiffs,

against

PAUL D. MCGINNIS, Commissioner of Correction, State of New York, HARRY FRITZ, Warden, Auburn Prison, Auburn, New York, J. L. CASSCLES, Warden, Ossining Correctional Facility, Ossining, New York,

Defendants.

APPEARANCES:

JAMES J. MCDONOUGH
Legal Aid Society of Nassau County, N. Y.
County Court House
Mineola, New York
Attorney for Plaintiffs

Of Counsel:
JOEL ZIEGLER
MATTHEW MURASKIN

LOUIS J. LEFKOWITZ
Attorney General of the State of New York
80 Centre Street
New York, New York
Attorney for Defendants

Of Counsel:
SAMUEL A. HIRSHOWITZ
MICHAEL COLODNER

Opinion of the United States District Court Convening Three Judge Court, dated January 21, 1971.

LASKER, D. J.

Plaintiffs James Royster and Percy Rutherford, New York State prisoners in the Auburn and Ossining Correction Facilities, respectively, bring this class action on behalf of themselves and others similarly situated seeking a declaratory judgment that Section 230(3) of the New York Correction Law, under which their "good time" was computed, is unconstitutional, and for an injunction against the alleged discriminatory practices pursued by defendants in application of that statute.

This suit is brought under 42 U.S.C. § 1983 (the "Civil Rights Act") invoking the jurisdiction of this court pursuant to 28 U.S.C. § 1343(3). Plaintiffs now move for the convocation of a three-judge district court under 28 U.S.C. §§ 2281, 2284, to consider the allegations of unconstitutionality and enjoin enforcement of the state statute in question.

Plaintiff Royster was indicted by a Nassau County Court grand jury on June 15, 1965. Upon failing to post a $3,000 bail bond (later increased to $7,500 to cover a second indictment), he was remanded to the Nassau County jail. He was thereafter convicted of burglary in the third degree and grand larceny in the first degree, after a trial by jury, in the Supreme Court, Nassau County. On May 20, 1966, he was sentenced to consecutive sentences of five to ten years on each count, and on May 26, 1966 he was received in state prison. Prior to the latter date, he had spent one year, one month and nine days, or 404 days ("jail time"), in the Nassau County Jail, beginning with the date of his arrest on April 17, 1965.

Plaintiff Rutherford was indicted on January 25, 1966 by the Nassau County Court grand jury and held in $5,000 bail, which he was not able to post. He was convicted, after a jury trial, in the Supreme Court, Nassau County, and

sentenced on November 1, 1966, to concurrent terms of ten to twenty years for robbery in the first degree and two and one-half to five years for grand larceny in the second degree, and a suspended sentence on each of two assault, second degree convictions. By the time he was received in state prison on November 4, 1966, plaintiff Rutherford had spent eight months and two days, or 242 days ("jail time"), in the Nassau County Jail awaiting trial and sentencing.

Although both plaintiffs were entitled to, and did, receive *jail time* credit against the terms of sentence imposed upon them for the period of their incarceration in county jail (Penal Law, § 2193(1)), they did not receive, and under the provisions of Section 230(3) of the Correction Law were not entitled to receive, *good behavior time credit* ("good time credit") for this period of detention served in county jail prior to transfer to state prison.

Plaintiffs contend that if they had received good time credit for the time spent in county jail between arrest and sentence, they would be entitled to appear before the Parole Board several months (in Royster's case, over four months; in Rutherford's, nearly three months) earlier than they will be under the state's present computation pursuant to the language of Section 230(3). Plaintiffs therefore bring this action to compel defendants to recompute their "minimum release dates" (that is, the dates upon which they would first have the right to appear before the Parole Board), contending that they should receive good time credit for the time served in jail prior to their reception at their respective state prisons. Plaintiffs urge that the withholding from them of good time credit for the period of their incarceration in county jail deprives them of equal protection of the laws in violation of the Fourteenth Amendment in that such a method of computing good time discriminates against those

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prisoners who cannot afford or, in some cases, are not even granted, bail while awaiting trial and sentencing.

That Section 230 of the Correction Law sanctions and, indeed, requires the denial of good time credit for the time plaintiffs served in jail seems clear from the face of the statute. Subsection 2 thereof provides that a state prisoner may receive, "for good conduct and efficient and willing performance of duties assigned, a reduction of sentences not to exceed ten days for each month of the minimum term in the case of an indeterminate sentence . . .,"[1] and subsection 3 states that "in the case of an indeterminate sentence prisoner said reduction shall be computed upon the minimum term of such sentence, *less jail time allowance.*" (Emphasis added.) It is on the basis of the statutory formula set forth in these two subsections that an indeterminate sentence prisoner's minimum release (or parole) date is calculated, and it is this method of computation that, plaintiffs claim, deprives them of equal protection of the laws. It should be noted, however, that jail time is *not* excluded from the computation of a prisoner's maximum good time allowance for purposes of determining his "statutory release date" pursuant to subsection 4 of Section 230. This date, which is arrived at by deducting a prisoner's good time allowance from the *maximum* term (not the minimum term, as in the case of the maximum release date) of an indeterminate sentence, is the earliest date on which an inmate *must* be paroled by the Parole Board (unlike the minimum release date, which is the earliest date on which an inmate *can* be paroled at the discretion of the Parole Board). And the New York courts have construed Section 230(4) (which, unlike Section 230(3), does not contain the same explicit language denying credit for jail time) to require that good time credits earned thereunder be allowed not only for time served in state prison but also for pre-sentence

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jail time.[3] Similarly, Section 230(3) itself provides that in the case of prisoners confined in county penitentiaries,[4] as opposed to those confined in state prisons, good time reductions "shall be computed upon the term of the sentence as imposed by the court, including *jail time allowance.*" (Emphasis added.)

The issue here raised is identical to the question presented to this court recently in the case of *Phipps* v. *McGinnis*, 69 Civ. 3236 (S.D.N.Y.). In two unreported decisions (which are annexed hereto and are dated March 20, 1970 and April 13, 1970, respectively), I found that plaintiff had stated a cognizable claim under the Civil Rights Act and that this court had jurisdiction thereof, that the complaint (which was substantially similar to the one here in issue) stated a claim upon which relief could be granted, and, finally, that a substantial constitutional question had been raised requiring the convening of a three-judge district court.[4] I still adhere to these views, and, in the interest of brevity, reference is made without further comment to the earlier opinions.

Inasmuch as the state has adduced substantially more authority in support of its position in these cases than it did at the time of the *Phipps* case, however, a comment is in order on the several bases now suggested by defendants for upholding the rationality of the distinction made by Section 230(3) between jail and non-jail defendants with regard to the awarding of good time credit.

Defendants contend that since county jails and state prisons differ in both their intended goals and available facilities, the deduction of jail time in determining good time is eminently reasonable and logical. Whereas, defendants claim, state correctional facilities are designed to serve a three-fold purpose of imposing punishment, protecting society and, most importantly, rehabilitating the inmate, county jails exist primarily as detention facilities

o restrict prisoners awaiting trial. Similarly, defendants rgue, whereas the facilities in state prisons are equipped o provide long-term educational and vocational programs ith good time granted as an incentive to the inmates to articipate in these programs, county jails are not equipped o provide such services and consequently there is no oportunity to evaluate an inmate's performance, nor need to ncourage his participation, in such programs. Nevertheess, defendants acknowledge that the overriding considerain the granting of good time reductions is the maintenance of prison discipline. (Defendants' Memorandum f Law, dated November 9, 1970, at p. 15). Indeed, a New ork state court which upheld the constitutionality of Sec-on 230(3) has stated:

> "The policy underlying the discretionary grant of good time reductions is clear. The attitude and conduct of prisoners should improve if they are offered an incentive for good and productive behavior while at the same time the fact that reductions can be withheld will inhibit bad conduct." *Perez* v. *Follette*, 58 Misc.2d 319, 321, 295 N.Y.S.2d 231, 233 (Sup. Ct., Dutchess County, 1968); aff'd 31 A.D.2d 600, 295 N.Y.S.2d 608; motion for leave to appeal dismissed as moot, 23 N.Y.2d 737, 296 N.Y.S.2d 569 (1968).

f the legislative purpose of this statute was, as it clearly eems to have been, to encourage good conduct on the part f prisoners, the particular time or place of their inarceration would not appear to be a relevant considera-on. Rather, "it would seem that awarding good time redit for time served *both* before and after sentencing, hether by jail or prison authorities, would serve the reater goal of inducing good behavior by the prisoners roughout the total period of their confinement." *Phipps McGinnis*, supra, 69 Civ. 3236 (S.D.N.Y. March 20, 1970,

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at p. 9). In addition, even assuming as true the asserte disparity in goals and facilities between the two types o institutions, the state itself apparently experiences littl difficulty in granting good time credit for pre-sentence jai time both in the case of the county penitentiary inmat and in the case of the indeterminate sentence prisoner' statutory release date from state prison. In both instance jail time is included in the computation of a prisoner' good time allowance despite the fact that the type of ac tivity required of an inmate to earn good time credit in county penitentiary or in state prison is allegedly vastl different from that which could be required of an in dividual incarcerated in county jail. Finally, it shoul be noted that plaintiffs' requested change in the metho of good time computation for purposes of minimum re lease could probably be implemented without major dif ficulty simply by having county jail authorities certify a the time of a prisoner's receipt in state prison whether o not he is entitled to good time credit for the time he passe in county jail. In fact, whatever method is now used b state authorities to compute the good time allowance of county penitentiary prisoner, or, indeed, of an indeter minate sentence prisoner for purposes of his statutor release, could seemingly be employed here as well. I would not appear equitable that plaintiffs and other prison ers like them should be made to bear the yoke of unequa and prolonged confinement merely because of the adminis trative division of labor between county and state priso authorities.

Defendants also argue that, since county jails are super vised by local officials and not, like state prisons, by stat correction authorities, and since it is these state official who must eventually make the sensitive decision whethe to release a prisoner prior to the expiration of his mini mum sentence or not, the granting of good time (which, i

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turn, determines a prisoner's minimum parole date) should be made only on the basis of personal observation and evaluation of the prisoner's conduct by state officials while he is actually confined in their custody in state prison. But this difficulty, if real, can be easily overcome. If the Board should feel that there has not been sufficient time for evaluation by state officials of the prisoner's conduct and his potential for early release, it can simply refuse to release him, and, barring an excessive abuse of discretion in this regard, such a sensitive determination would not be subject to judicial review. Thus, the very fact that the Board *can* exercise such broad discretion in determining whether to release a prisoner on parole at the time of his minimum release date would seem to compensate for whatever evaluation time may be lost to the Board during the period of a prisoner's county jail incarceration.

Moreover, it would probably often be the case, as it is with regard to the two named plaintiffs herein, that, even with the allowance of good time credit for jail time, the amount of time available to the Parole Board for observation and evaluation of a particular prisoner while in state prison would be only minimally reduced. From the prisoner's point of view, on the other hand, even such a minimal reduction in his time served would surely be of great consequence to him. In plaintiff Rutherford's case, for example, if he were to receive good time credit for the time he spent in county jail prior to sentence, he would spend five years, 11 months and 28 days in state prison (plus eight months and 2 days in county jail) before becoming eligible to meet the Parole Board whereas under the state's present computation he will have to spend six years, two months and 19 days in state prison (plus the eight months and two days in county jail) before he can meet the Parole Board. While the additional two and one-half months in state prison would probably add pre-

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cious little to the sum of the Parole Board's knowledge of plaintiff after nearly six years of observation and evaluation, the possibility of gaining his freedom some 81 days earlier would undoubtedly be a matter of great moment to plaintiff Rutherford and other imprisoned men like him.

Finally, defendants contend that plaintiffs are not really challenging the good time provisions of Section 230, but rather are attacking the consequences of the bail system. Defendants argue that, while there is an obvious difference in treatment between those free on bail and those in custody for failure to make bail, such a classification of "jail versus bail" is a constitutionally permissible one expressly provided for by the Eighth Amendment, and the consequences of such a classification cannot be deemed to constitute invidious discrimination. I do not disagree with this proposition; however, I have serious doubts as to whether it meets the issue at hand. Defendants rely heavily on *Rigney* v. *Hendrick*, 355 F.2d 710 (3d Cir. 1965), cert. denied 384 U.S. 975, where a defendant who was unable to post bail was, while in jail, placed in a line-up that subsequently led to his identification by a victim of another crime. In rejecting his claim of a denial of equal protection, the Third Circuit stated, at 715:

> "Here we cannot find an invidious discrimination for the different methods employed by the police in securing the identification of a suspected criminal are made necessary because of the difference in circumstances in which those free on bail and those detained find themselves. Admittedly, there is a classification between those who can and those who cannot make bail. The Constitution, however, permits such a classification, and any differences here arise solely because of *the inherent characteristics of confinement*

and cannot constitute invidious discrimination." (Emphasis added)

The real question, then, is whether or not the denial of good time credit for jail time is an "inherent characteristic of confinement." While it follows naturally that certain rights, such as "the right of privacy, to earn a livelihood, to vote, to speak freely, to associate with persons of one's choosing," *Morris* v. *Crumlish*, 239 F.Supp. 498, 500 (E.D.Pa. 1965), must be denied to unbailed defendants as a necessary consequence of their confinement, I do not believe that it follows that denial of good time credit is in any way an "inherent characteristic of confinement." Rather, the grant or denial of good time would seem to be a wholly independent creature of statute. Surely the purpose of the Eighth Amendment—to insure, by bail or, for want of that, by pre-trial incarceration, the defendant's appearance in court—would be equally well served whether or not good time credit was subsequently granted for jail time. Thus, it would appear that "while such distinctions *as are necessitated by confinement* while awaiting trial may be made between those who supply bail and those who cannot," *Rigney* v. *Hendrick*, supra, 355 F.2d at 716-717 (dissenting opinion, Freedman, J.) (emphasis added), the unequal denial of good time credit for jail time required by Section 230(3) is not inherently related to such confinement and may well constitute an invidious discrimination.

In any event, as Judge Friendly recently noted, "[t]he issue here is not whether [the state statute] is unconstitutional but whether plaintiffs' claim of unconstitutionality [is] unsubstantial 'either because it is obviously without merit or because its unsoundness so clearly results from the previous decisions of this court [the Supreme Court] as to foreclose the subject.'" *Latham* v. *Tynan*, —— F.2d —— (2d Cir., decided December 16, 1970, Docket

No. 34668, at 850) (dissenting opinion). Plaintiffs' claim herein meets this test of substantiality.

Accordingly, plaintiffs' application for the convening of a three-judge court is granted.

It is so ordered.

Dated: New York, New York
January 21, 1971 .

MORRIS E. LASKER
U.S.D.J.

FOOTNOTES

[1] We are here dealing with an "indeterminate sentence," that is, a "sentence to imprisonment in a state prison having minimum and maximum limits fixed by the court." Correction Law, § 230(1).

[2] Under § 230(4) the statutory release date is set at the rate of five days off per month (as opposed to 10 days in the case of the minimum release date), or one-sixth of the maximum expiration date (that is, the maximum date of a sentence to which an inmate can be held if he receives no good time credit whatsoever, either for time served in jail or prison).

It should be noted that the statutory scheme of § 230, which is the subject of this lawsuit, is no longer the law in New York. On September 1, 1967, § 230 was replaced by §§ 803 and 805 of the Correction Law and §§ 70.30 and 70.40 of the new Penal Law, which sections apply to all convictions for offenses committed on *or after that date* (but not to convictions—as of plaintiffs herein—for offenses committed *prior to* the effective date). Significantly, under the new statutory scheme, good time earned on the minimum sentence is abolished altogether, thus removing any question of unequal treatment. An inmate meets with the Parole Board at the expiration of his minimum term regardless of how much good time credit he has earned against his maximum sentence or of how much time he spent in county jail prior to his receipt in state prison. Correction Law, § 805(3); Penal Law, § 70.40(1)(a). Thus,

good time is now credited solely against the maximum term of an indeterminate sentence, and it is awarded without regard to whether a prisoner has served time in county jail prior to sentencing. Correction Law, §§ 803(1), 805(1); Penal Law, §§ 70.30(4), 70.41(1)(b). This calculation is identical to that made formerly pursuant to § 230(4), except that a prisoner may now earn 10 rather than 5 days good time credit per month against his maximum sentence. This computation results in the Department of Correction setting, upon a prisoner's arrival at state prison, a "conditional release date" of one-third off the maximum sentence. As in the case of the statutory release date under § 230(4), a prisoner must automatically be released (if he has not in the interim incurred any penalties which have reduced his good time allowance) upon reaching his conditional release date. In addition, any person covered by § 230(4) of the old Correction Law by reason of having committed the offense for which he was convicted prior to September 1, 1967 is entitled, at any time, to elect to serve his sentence under the provisions of the new Penal Law and the new chapters of the Correction Law, and so be eligible for "conditional release." Correction Law, § 230-a. Neither of the named plaintiffs has as yet made this election, presumably because it would foreclose them from receiving any good time credit whatsoever (either for prison time alone, or, as they now request, for both prison and jail time together) off of their minimum sentences and thus compel them to await the full expiration of their minimum terms before appearing before the Parole Board.

Thus, the scope of this case (and of any proposed class) is necessarily limited, for the challenged statute, § 230(3) of the Correction Law, now applies only to those prisoners who were convicted for offenses committed before September 1, 1967, whose minimum terms have not yet expired, who have not yet met the Parole Board, and who have not as yet elected the conditional release program under § 230-a. Nevertheless, the very existence of the issue in this case attests to the continuing presence and effect of § 230(3).

[3] Such penitentiaries are county correctional institutions maintained, in general, for the confinement of persons convicted of non-felony offenses carrying sentences of one year or less.

[4] In *Phipps*, the three-judge court eventually dismissed the case as moot because by that time the plaintiff had already appeared before the Parole Board for consideration for minimum release. *Phipps* v. *McGinnis*, 69 Civ. 3236 (S.D.N.Y. May 13, 1970). The court, therefore, did not reach the merits of the case.

Opinion of United States District Court in *Phipps v. McGinnis*, dated March 20, 1970, Annexed to Opinion of January 21, 1971.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

69 Civ. 3236

ROBERT E. PHIPPS,

Plaintiff,

against

PAUL D. McGINNIS, Commissioner of Correction and HAROLD W. FOLLETTE, Warden, Green Haven Prison, Stormville, New York,

Defendants.

APPEARANCES:

Robert E. Phillips, Plaintiff, pro se
Drawer B
Stormville, N. Y. 12582

Louis J. Lefkowitz
Attorney General of the State of New York
Attorney for Defendants
of Counsel: John G. Proudfit.

MEMORANDUM OPINION

LASKER, D. J.

Defendants move pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for an order dismissing plaintiff's complaint on the ground that the complaint fails to state a claim upon which relief may be granted. Defendants contend that plaintiff's claim "does not raise a valid issue for consideration by this Court." I disagree.

Opinion of United States District Court in Phipps v. *McGinnis, dated March 20, 1970, Annexed to Opinion of January 21, 1971.*

After arrest, but before conviction, plaintiff spent 488 days in county jail. He is presently in the custody of the Warden of Green Haven Prison, Stormville, New York, where he was received June 5, 1968, after a conviction in Nassau County Court of the crimes of burglary in the third degree, possession of burglar's tools as a felony, and petty larceny. He is serving an indeterminate sentence of 3½ to 5 years. He has been granted jail time credit of 488 days for the time he spent in county jail prior to transfer to state prison. However, he has received no "good behavior time" credit ("good time" credit) for the time so served in jail.

Plaintiff has brought the instant action to compel defendants to recompute his minimum release date (that is, the date upon which he would first have the right to appear before the parole board), contending that he should have received good time credit for the time served in jail prior to his reception at the state prison. As indicated below, if the plaintiff's position is correct he would be entitled to appear before the parole board aproximately five months earlier than he would on the basis of the state's computation. Plaintiff urges that the withholding from him of good time credit for the period of his incarceration in county jail (from the date of his arrest to the date of his delivery to state prison) deprives him of equal protection of the laws in violation of the Fourteenth Amendment in that such a method of computing good time discriminates against a prisoner who cannot afford to obtain bail while awaiting sentencing.

Plaintiff therefore seeks a declaratory judgment that Section 230 of the New York Correction Law under which his so-called good time was computed is unconstitutional, and for an injunction against the alleged discriminatory practices pursued by defendants in application of that statute.

Opinion of United States District Court in Phipps v. McGinnis, dated March 20, 1970, Annexed to Opinion of January 21, 1971.

Plaintiff (moving *pro se*) brings his suit under 42 U.S.C. §§ 1981, 1983 (the "Civil Rights Act") and invokes the jurisdiction of the court under 28 U.S.C. § 1343(3). He also seeks the convocation of a three-judge district court pursuant to 28 U.S.C. §§ 2281, 2284, to consider the allegations of unconstitutionality and enjoin enforcement of the state statute in question. Plaintiff seeks no money damages, but only the recomputation of his time to appear before the parole board.

Defendants present two arguments in support of their motion to dismiss: first, that the court lacks jurisdiction since plaintiff's suit seeks release from prison and attempts improperly to avoid the requirements of 28 U.S.C. § 2254; and second, that in any event the complaint fails to state a claim upon which relief may be granted. I treat these contentions separately below.

JURISDICTION

It is settled that the Civil Rights statute cannot be used by a state prisoner to circumvent established rules of comity and the requirement of the federal statute that habeas corpus shall not be granted unless it appears that the applicant has "exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254; *Smartt* v. *Avery*, 411 F.2d 408 (6th Cir. 1969); *Greene* v. *State of New York*, 281 F.Supp 579 (S.D.N.Y. 1967); *Lombardi* v. *Peace*, 259 F.Supp. 222 (S.D.N.Y. 1966). Thus, it has been held that redress of alleged civil rights violations incurred in state criminal proceedings or release from custody of persons imprisoned by state courts may not be secured under the Civil Rights Act. See, e.g., *Martin* v. *Roach*, 280 F.Supp. 480 (S.D.N.Y. 1968); *Peinado* v. *Adult Authority of Department of Corrections*, 405 F.2d 1185

(9th Cir. 1969); *Johnson* v. *Walker,* 317 F.2d 418 (5th Cir. 1963).

In the instant action, however, plaintiff makes no charge of unconstitutional detention resulting from any illegality in his state court trial and conviction. While it is true that the complaint (prepared exceedingly well for a layman, but nevertheless inartistically) does request "discharge to parole", I construe this to constitute a prayer for the right to appear before the parole board and not for release from prison.

Neither the plaintiff's complete nor his immediate liberty is at stake, for even if the relief requested were granted and plaintiff secured an immediate hearing before the parole board, nevertheless the parole board's power is discretionary and an adverse decision would not be subject to judicial review. *United States ex rel. Campbell* v. *Pate,* 401 F.2d 55, 57 (7th Cir. 1968). However, if plaintiff's time has not been properly computed, what he does lose is, as the *Campbell* court phrased it, "the possibility that if he appeared before the board he might persuade it to decide in his favor. Of course this loss, in practical, human, terms is serious and involves a changes for at least qualified liberty." *Id.*

The traditional view is undoubtedly that federal courts have no power to interfere in the internal discipline of state penal institutions. See, e.g., *Wright* v. *McMann,* 387 F.2d 519, 522 (2d Cir. 1967); *Siegel* v. *Ragen,* 180 F.2d 785, 788 (7th Cir. 1950). It is now settled, however, that, although the rights of a person serving a valid state sentence are limited, "he does have some federally protected rights which he may redress by a sec. 1983 action against those who have custody of him." *United States ex rel. Campbell* v. *Pate,* supra, at 57; *Wright* v. *McMann,* supra.

The applicable legal principles are no longer in serious

dispute. The Civil Rights Act specifically creates a cause of action for deprivations, by persons acting under color of state law, of rights secured by the Constitution. See *Monroe* v. *Pape*, 365 U.S. 167 (1961). Furthermore, that state prisoners fall within the protection of 42 U.S.C. § 1983 and may bring an action under the Civil Rights Act is established, *Cooper* v. *Pate*, 378 U.S. 546 (1964); *Wright* v. *McMann*, supra; *Jordan* v. *Fitzharris*, 257 F.Supp. 674 (N.D. Calif. 1966); and a district court has power to grant injunctive relief where there has been a deprivation of civil rights, *Sewell* v. *Pegelow*, 291 F.2d 196 (4th Cir. 1961). Moreover, as distinct from the provisions of 28 U.S.C. § 2254, the Civil Rights Act, when properly relied upon for federal jurisdiction, does not require the exhaustion of state judicial remedies.[2] As the Second Circuit Court stated in *Wright* v. *McMann*, supra, at 522-523:

> "Any remaining belief in the vitality of the exhaustion principle was dispelled when the concurrent jurisdiction of the federal courts in cases under the [Civil Rights] Act was reaffirmed in clear terms in McNeese v. Board of Education, 373 U.S. 668, 83 S.Ct. 1433, 10 L.Ed.2d 622 (1963)."

Finally, and perhaps most importantly as to the plaintiff here, it is settled that

> ". . . prisoners do not lose all their constitutional rights and that the Due Process and Equal Protection Clauses of the Fourteenth Amendment follow them into prison and protect them there from unconstitutional action on the part of prison authorities carried out under color of state law." *Washington* v. *Lee*, 263 F.Supp. 327 (M.D. Ala. 1966) (Johnson, J.)

Indeed, numerous courts have found the presence or absence of an equal protection claim to be of critical impor-

tance in assessing the jurisdictional propriety of the civil rights action in question. See, e.g., *Peinado* v. *Adult Authority of Department of Corrections,* supra, at 1186; *United States ex rel. Campbell* v. *Pate,* supra, at 57; cf. *Burns* v. *Crouse,* 339 F.2d 883, 884 (10th Cir. 1964), cert. denied 380 U.S. 925 (1965).

Accordingly, notwithstanding defendants' construction of plaintiff's complaint as a habeas corpus petition which would require exhaustion of state remedies, I conclude that plaintiff has stated a cognizable claim under the Civil Rights Act and that this court has jurisdiction.[3]

THE MERIT OF THE COMPLAINT

Finding that the jurisdictional requirements have been satisfied, I turn to defendants' contention that no cause of action has been stated upon which relief can be granted. Defendants have apparently computed plaintiff's minimum release date by subtracting the time he served in county jail from his minimum sentence and then dividing by three to determine the maximum good time reduction to which plaintiff might be entitled. Plaintiff, on the other hand, contends that jail time should not be subtracted from the minimum sentence before the maximum allowance for good time is computed.

On its face, Section 230 of the Correction Law would appear to validate defendants' method of computation. Subsection 2 provides that a state prisoner may receive, "for good conduct and efficient and willing performance of duties assigned, a reduction of sentence not to exceed ten days for each month of the minimum term in the case of an indeterminate sentence . . ."[4] Subsection 3 states that "in the case of an indeterminate sentence prisoner said

reduction shall be computed upon the minimum term of such sentence, *less jail time allowance.*" (Emphasis added.)[5] Thus, while jail time itself must be credited against the term of any sentence imposed (Penal Law, § 70.30(3)), a prisoner, seemingly on the basis of the statutory formula set forth above, is denied any good behavior time credit for such jail time when his maximum good time allowance is computed. It is this provision of the statute and this practice which, plaintiff claims, deprive him of equal protection of the laws.

The practical effect of this section, plaintiff contends, is to discriminate against those indigent defendants who cannot afford bail and so must serve time in jail awaiting sentence, while rewarding those fortunate enough to obtain bail prior to judgment with a full allowance of good time credit. In the instant case, plaintiff argues that his inability to furnish bail has resulted in a loss of about five months' good time credit during the sixteen-month period he spent in county jail. He maintains that had he been able to post bail and thereby avoid any jail time prior to sentence, he would have been eligible to appear before the parole board in 28 months (based on a one-third reduction of the minimum sentence), whereas with the loss of the five months' good time noted above, he does not become eligible for parole until a total of some 33 months of confinement (both in county jail and state prison) have elapsed.

In a recent state court proceeding involving an identical claim by another prisoner, the court attempted to explain the rational basis for this otherwise inexplicable distinction in treatment between bail and non-bail defendants. In *Perez* v. *Follette*, 58 Misc.2d 319, 295 N.Y.S.2d 231, 233-234 (Sup. Ct., Dutchess County, 1968), the court stated:

Opinion of United States District Court in Phipps v. *McGinnis, dated March 20, 1970, Annexed to Opinion of January 21, 1971.*

"The policy underlying the discretionary grant of good time reductions is clear. The attitude and conduct of prisoners should improve if they are offered an incentive for good and productive behavior while at the same time the fact that reductions can be withheld will inhibit bad conduct. Necessarily this policy can be implemented only during the time a prisoner is in the actual custody of the officials who will grant or withhold reductions. Thus the time a prisoner is in the custody of others—that is when he is serving jail time before sentence—cannot be counted as time for which good time reductions can be granted or withheld. This is a rational basis for the statute petitioner challenges."

I do not find this reasoning so persuasive or compelling as to warrant a dismissal on the merits of plaintiff's cause of action. On the contrary, it would seem that awarding good time credit for time served *both* before and after sentencing, whether by jail or prison authorities, would serve the greater goal of inducing good behavior by the prisoners throughout the total period of their confinement.

In addition, recent case law suggests a split in authority among the state courts as to the proper interpretation of the statute itself. In *People* v. *Deegan*, 56 Misc.2d 567, 289 N.Y.S.2d 285 (Sup.Ct., Westchester County, 1968), the court was confronted with the identical issue here involved as it applied to the conditional (or maximum), rather than minimum, release date of a state prisoner. Plaintiff there contended that the good behavior allowance provided in Section 230(4) and Section 230-a of the Correction Law contemplated the inclusion of jail time in determining the amount of sentence reduction for conditional release purposes. The state, on the other hand, argued that under the

statute prisoners could be credited with good time only for the time actually served in state prison. Justice Trainor rejected the state's position, observing at 287:

> "Adoption of the respondent's interpretation would have the effect of prejudicing a defendant who was unable to raise funds in order to be released on bail, and would deprive him of 'equal protection of the laws' in violation of the 14th Amendment of the U. S. Constitution. . . . If there is logic or justice in this anomaly it escapes the court."

It is true that Justice Trainor, in construing Section 230(4), was not faced with language explicitly referring to the subject of "jail time" and was therefore able to resolve the ambiguity in favor of plaintiff's personal liberty, whereas here the plaintiff challenges Section 230(3), which specifically refers to deduction of jail time. Indeed, Justice Trainor himself took note of the apparent inconsistency between subdivisions 3 and 4 of Section 230 by stating at 287:

> "It is curious that subdivision 3 of said section . . . specifically mentions 'jail time' in establishing a formula for sentence reduction, while subdivision 4 is silent as to that phrase."

I share Justice Trainor's skepticism as to the internal consistency of a statute which, for conditional release purposes, reduces a prisoner's *maximum* sentence by the amount of good behavior credit accumulated during jail time while, for minimum release purposes, it refuses to discount that same prisoner's *minimum* sentence by the same amount of good time credit earned during the same stay in jail. It would seem that both subsections should follow a single formula with regard to sentence reductions,

Opinion of United States District Court in Phipps v. *McGinnis, dated March 20, 1970, Annexed to Opinion of January 21, 1971.*

and, as stated by Justice Trainor, adherence to the defendants' method of calculation could constitute a violation of the constitutional guarantee of equal protection.

Recently, the Supreme Court, Suffolk County, had occasion to pass on the same question that had earlier come before the *Deegan* court. In *Paul* v. *Warden of the Suffolk County Jail* (New York Law Journal, May 21, 1969, at p. 18, col. 6), Justice Ritchie characterized the uneven treatment of bail and non-bail defendants under Section 230(4) in the following unqualified language:

> "This court is not in agreement with [the] method employed. It is inequitable in that it discriminates against those persons charged with crime that are able to furnish bail upon arraignment and those remanded as a result of inability to furnish bail.
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> . . . .
>
> "This court refuses to countenance such disparity and discrimination and finds it extremely difficult to perceive that such was the intent of the legislation enacted permitting reductions in sentence for good behavior during imprisonment."

For the reasons stated above I find that the court has jurisdiction in the matter and that the complaint states a claim upon which relief may be granted. The defendants' motion to dismiss is hereby denied.

Dated: New York, N. Y., March 20, 1970.

MORRIS E. LASKER
U.S.D.J.

FOOTNOTES

[1] The case is before me solely on defendants' motion to dismiss the complaint. However, an examination of the complaint indicates that plaintiff seeks the convening of a three-judge court, but

Opinion of United States District Court in Phippe McGinnis, dated March 20, 1970, Annexed to Opinio of January 21, 1971.

he has made no distinct motion to convene such a court. The cou has secured an offer of counsel to assist defendant with the pr cedural complexities involved.

[2] In passing, it should be noted that plaintiff did in fact fir seek relief in the state courts. He brought an Article 78 proceed ing to compel defendants to recompute the date when he migh first appear before the parole board. On June 19, 1969, the Suprem Court, Dutchess County, relying on the reasoning of *Perez* v. *Fo lette*, infra, dismissed plaintiff's petition. He then brought th instant action in federal court.

[3] Several recent federal cases which sustain the court's accep ance of jurisdiction in the suit at bar are: 1) *United States ex re Campbell* v. *Pate*, supra, in which the Seventh Circuit reversed th district court's dismissal of a state prisoner's § 1983 action an held that his complaint, alleging the capricious reduction of mer time and resultant postponement of the date of his parole hearin stated a claim of denial of equal protection upon which relief coul be granted; 2) *Douglas* v. *Sigler*, 386 F.2d 684 (8th Cir. 1967), i which the Eighth Circuit (and the trial court) accepted jurisdic tion of a state prisoner's civil rights action which alleged that Nebraska state statute relating to a convict's loss of good tim credit for misconduct and the effect of good behavior thereafte was vague, overly broad and ambiguous and thus violative of du process and equal protection under the Fourteenth Amendment and 3) *Rodriguez* v. *McGinnis* (N.D.N.Y. 1969) (not yet officiall reported; unofficially reported in 38 U.S.L.W. 2380, Jan. 13, 1970) where Judge Foley held that a New York state prisoner who wa denied good time credit by Prison Commutation Board that faile to make required written report to Commissioner of Correction on its reasons for denial had been deprived of due process an equal protection of the law, and was therefore entitled to a § 198 injunction requiring prison authorities to credit this time to parol and to conditional release forthwith.

[4] We are here dealing with an "indeterminate sentence," that i a "sentence to imprisonment in a state prison having minimum an maximum limits fixed by the court." Correction Law, § 230(1).

[5] Apparently the only exception to this rule is in the case of prisoner confined in a county penitentiary, whose "reduction sha be computed upon the term of the sentence as imposed by th court, *including jail time allowance.*" Correction Law, § 230(3) (Emphasis added.) Such a distinction within the very section itsel would seem to raise possible equal protection objections.

Opinion of United States District Court in *Phipps* v. *McGinnis*, dated April 13, 1970, Annexed to Opinion of January 21, 1971.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

69 Civ. 3236

ROBERT E. PHIPPS,

Plaintiff,

against

PAUL D. MCGINNIS, Commissioner of Correction and HAROLD W. FOLLETTE, Warden, Green Haven Prison, Stormville, New York,

Defendants.

MEMORANDUM OPINION

APPEARANCES:

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LASKER, D. J.

Robert E. Phipps, the plaintiff, is a New York State prisoner at Green Hill Prison, Stormville, New York. He

brought suit by pro se complaint under 42 U.S.C. §§ 1981, 1983 (the "Civil Rights Act") invoking the jurisdiction of the court under 28 U.S.C. § 1343(3), seeking a declaratory judgment that Section 230 of the New York Correction Law is unconstitutional, and for an injunction against alleged discriminatory practices pursued by the defendants in accordance with that statute. Prior hereto the defendants moved, pursuant to Rule 12(b) (6), F.R.Civ.P., to dismiss plaintiff's complaint on the ground that it failed to state a claim upon which relief could be granted. By memorandum opinion of March 20, 1970, I denied the motion.

Plaintiff is presently represented by counsel and has filed an amended complaint, which he is entitled to do as a matter of right under Rule 15(a), F.R.Civ.P., this being his first amended pleading and no responsive pleading having been served since the filing of the original complaint.

Plaintiff now moves for the convening of a district court of three judges under 28 U.S.C. § 2281, et seq., and seeks a determination that the case is properly brought as a class action under Rule 23, F.R.Civ.P. Plaintiff is serving an indeterminate sentence of three and one-half to five years. Prior to his conviction he served 488 days in county jail awaiting trial. Although he received jail time credit for this period of detention pursuant to New York Penal Law § 70.30(3), he has not received, and under the provisions of Section 230(3) of the Correction Law he apparently is not entitled to receive, good behavior time credit ("good time credit") for the period he spent in jail between arrest and sentence. If the plaintiff had received good time credit for the time he spent in county jail between arrest and sentence, he would have been entitled to appear before the Parole Board approximately five months earlier

than he will be as the result of the lesser credit allowed by Section 230(3).

The burden of plaintiff's complaint is that Section 230 of the Correction Law violates the Fourteenth Amendment to the Constitution of the United States because it denies equal protection of the law to indigent people who cannot afford to obtain bail between arrest and sentence. He argues that those who can furnish bail prior to sentence earn a full allowance of good time credit for the entire period which they ultimately spend in custody, whereas indigent defendants who are jailed between arrest and sentence because of their inability to furnish bail are not entitled under the statute to good time credit for the time spent in jail.

The amended complaint is substantially identical to Phipps' original complaint except that it expressly applies for the convening of a three-judge court and states that plaintiff has instituted the suit as a class action in a representative capacity on behalf of all inmates of prisons of the State of New York who have been denied good time credit under the provisions of Section 230. Although the issues before me on defendants' motion to dismiss the original complaint are not precisely the same as those now presented, there is a substantial similarity between them, and reference is made to the views which I expressed in my prior memorandum opinion as to the validity of plaintiff's complaint.

The question before me now is whether a three-judge court should be convened. The criteria necessary to such a determination were described by the Supreme Court in *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U.S. 713, 715, 82 S.Ct. 1294, 8 L.Ed.2d 794, as follows:

> "When an application for a satutory three-judge court is addressed to a district court, the court's inquiry is

Opinion of United States District Court in Phipps v. McGinnis, dated April 13, 1970, Annexed to Opinion of January 21, 1971.

appropriately limited to determining whether the constitutional question raised is substantial, whether the complaint at least formally alleges a basis for equitable relief, and whether the case presented otherwise comes within the requirements of the three-judge statute."

The Court of Appeals of this Circuit has made it clear in the recent decision in *Heaney, et al*, v. *Allen, et al* (—— F.2d ——, slip Opinion No. 389, decided February 5, 1970), that these criteria must be seriously applied and that a three-judge court is not to be convened unless the district judge to whom the application is made finds that the issue before him presents a substantial constitutional question.

Since Section 230 acknowledgely has state-wide application (and therefore clearly comes within the provisions of 28 U.S.C. § 2281), and since plaintiff's amended complaint clearly alleges injury for which equitable relief may be appropriate, the only matter to be determined is the substantiality of the plaintiff's constitutional claim.

As indicated above, plaintiff argues that Section 230 violates the Fourteenth Amendment, since the effect of the statutorily prescribed method of computing minimum release dates is to penalize indigents as compared to non-indigents because of their failure to raise bail.

I find the plaintiff's constitutional claim to be substantial. In the landmark decision of *Griffin* v. *Illinois*, 351 U.S. 12 (1956), the Supreme Court established that the Equal Protection and Due Process clauses protect prisoners from invidious discrimination on account of poverty. In that case the Court held that, while a state could constitutionally deny the right of appeal, once it affords that right to persons convicted of crime it cannot effectively

condition the right "in a way that discriminates against some convicted defendants on account of their poverty." 351 U.S. at 18.

In *Bynum* v. *Connecticut Commission of Forfeited Rights*, 410 F.2d 173 (2d Cir. 1969), Judge Kaufman held that an attack on Connecticut's procedures for enabling ex-felons to regain the right to vote in elections raised constitutional questions substantial enough to require the convening of a three-judge court. The plaintiff's claim in *Bynum* was that Connecticut's requirement that ex-felons pay a $5 fee in order to gain consideration of their petition to regain the right to vote unjustly discriminated against the poor because wealth or fee payments have no relation to voting qualifications. The Court of Appeals concluded that this claim raised substantial constitutional questions. Similarly, the Court in *Gilmore* v. *Lynch*, 400 F.2d 228 (9th Cir. 1968), held that an Equal Protection claim challenging California prison regulations which prevent prisoners from keeping law books or reference material had sufficient constitutional merit to require the convening of a three-judge court. The appellants had contended that the prison regulations would enable affluent prisoners who could obtain outside counsel for legal research to gain effective access to the courts, whereas indigent prisoners' access would be limited.

Applying the principle of *Griffin* v. *Illinois*, *supra*, and its progeny to this case, it follows that, although New York State may not be required to grant parole[1] to plaintiff and others similarly situated, once it has undertaken to provide procedures for granting parole it cannot withhold or delay those procedures for reasons resulting from the prisoners' indigency, unless there are rational purposes for doing so. As I observed in my previous opinion, there appear to be no overriding justifications for the New York scheme for

computing good time credit, and two state decisions have impliedly questioned its constitutionality.[2] In these circumstances, it appears that plaintiff's claim has merit. Nor is it foreclosed by previous decisions of a higher court, cf. *California Water Service* v. *City of Redding*, 304 U.S. 252, 255, 58 S.Ct. 865, 867, 82 L.Ed. 1323 (1938).

Accordingly, the plaintiff's motion for the convening of a three-judge court under Title 18, §§ 2281, 2284, is granted for the purpose of determining the constitutionality of Section 230 of the New York Correction Law. A determination as to whether the suit has been properly brought as a class action will be deferred for consideration by the three-judge court itself.

It is so ordered.

Dated: New York, N. Y., April 13, 1970.

MORRIS E. LASKER
U.S.D.J.

FOOTNOTES

[1] It is true, as stated in my prior memorandum opinion, that neither the plaintiff's complete nor immediate liberty is at stake, since the Parole Board has the discretion to refuse parole even if he appears before the Board. However, the plaintiff's loss may nevertheless be real, for, as stated in *United States ex rel Campbell* v. *Pate*, 401 F.2d 55, 57:

> "What he is losing, . . . is the possibility that if he appeared before the board he might persuade it to decide in his favor. Of course, this loss, in practical, human, terms is serious and involves a chance for at least qualified liberity."

[2] *People* v. *Deegan*, 56 Misc.2d 567, 289 N.Y.S.2d 285 (Sup. Ct. Westchester County, 1968); *Paul* v. *Warden of the Suffolk County Jail* (New York Law Journal, May 21, 1969, at p. 18, col. 6).

Opinion of the Three Judge District Court, Filed August 23, 1971.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

70 Civ. 4365

JAMES ROYSTER, PERCY RUTHERFORD and all other persons similarly situated,

Plaintiffs,

against

PAUL D. MCGINNIS, *Commissioner* of Correction, State of New York, HARRY FRITZ, Warden, Auburn Prison, Auburn, New York, J. L. CASSCLES, Warden, Ossining Correctional Facility, Ossining, New York,

Defendants.

Before HAYS, Circuit Judge and METZNER and LASKER, District Judges.

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Opinion of the Three Judge District Court, filed August 23, 1971.

LASKER, D. J.

Two New York State prisoners have brought this class action seeking a declaratory judgment that Section 230(3) of the New York Correction Law, under which their "good time" was computed, is unconstitutional and an injunction against the alleged discriminatory practices pursued by defendants in application of that statute.

Plaintiffs attack the constitutionality of the provision in § 230(3) which denies state prisoners good time credit for the period of their pre-sentence incarceration in county jail. They contend that the denial of such good time credit deprives them of equal protection in violation of the Fourteenth Amendment by discriminating against those prisoners who cannot afford or are not granted bail prior to trial and sentencing.

This suit is brought under 42 U.S.C. § 1983 (the Civil Rights Act), with federal jurisdiction predicated on 28 U.S.C. § 1343(3). By opinion and order dated January 21, 1971, this court, having found that a substantial constitutional question had been raised, granted plaintiff's application to convene a three-judge court. *Royster* v. *McGinnis*, —— F. Supp. —— (S.D.N.Y. January 21, 1971).

Plaintiffs James Royster and Percy Rutherford are inmates of the Auburn and Ossining Correction Facilities, respectively. They bring this action on behalf of themselves and other state prisoners similarly situated who have served terms of incarceration in county jail prior to their transfer to state prison but have not received good time credit therefor. Royster, having been unable to post the requisite bail bond at the time of arrest, served one year, one month and nine days, or 404 days ("jail time"), in the Nassau County Jail prior to his transfer to state prison to serve consecutive five to ten years terms for burglary in the third degree and grand larceny in the first

egree. Rutherford also failed to make bail and, as a esult, spent eight months and two days, or 242 days "jail time"), in the Nassau County Jail prior to his trial, entencing, and receipt in state prison to serve concurrent erms of ten or twenty years for robbery in the first de- ree and two and one-half to five years for grand larceny n the second degree.

Although plaintiffs did receive *jail time* credit against he terms of their sentences for the period of their county ail incarceration,[1] they did not receive, and under the rovisions of § 230(3) were not entitled to receive, any *ood behavior time* credit ("good time") for this period f detention served prior to transfer to state prison. Con- ending that they should have received good time credit or the jail time so served, plaintiffs now seek to compel efendants to recompute their "minimum release dates" that is, the dates upon which they would first have the ight to appear before the Parole Board). They point ut, and it is not disputed, that were they to receive good ime credit for time spent in county jail between arrest nd sentence, they would be entitled to appear before the arole Board several months (over four months, in oyster's case; nearly three months, in Rutherford's) arlier than they will under the computation required by 230(3).

There is no doubt that by its express wording Section 30 mandates the denial of good time credit for the time laintiffs served in county jail awaiting trial and sentenc- ng. Subsection 2 thereof provides that a state prisoner ay receive, "for good conduct and efficient and willing erformance of duties assigned, a reduction of his sen- ence not to exceed ten days for each month of the mini- mum term in the case of an indeterminate sentence . . .," nd subsection 3 states that "in the case of an indetermi-

nate sentence prisoner said reduction shall be computed upon the minimum term of such sentence, *less jail time allowance*" (emphasis added). However, while jail time *is* excluded from the calculation of an indeterminate sentence prisoner's maximum good time allowance for purposes of determining his minimum release (or parole) date under § 230(3), it is *not* excluded from such computation when it comes to setting the same prisoner's "statutory release date" pursuant to subsection 4 of Section 230. The latter date is the earliest date on which an inmate *must* be paroled by the Parole Board and is arrived at by deducting a prisoner's total good time allowance (five days per month) from the *maximum* term of his indeterminate sentence. By contrast, the minimum release date signifies the earliest date on which an inmate *may* be paroled at the discretion of the Parole Board, and it is computed by deducting the prisoner's total good time credit (ten days per month) from the *minimum* term of his indeterminate sentence.

It is significant that the New York courts[3] have construed § 230(4) (which, unlike § 230(3), does not contain the same explicit language denying good time credit for jail time) to require that good time credits earned thereunder be allowed not only for time served in state prison but also for presentence jail time.[4] Similarly, § 230(3) itself provides that in the case of prisoners confined in county penitentiaries,[5] as opposed to those confined in state prisons, good time reductions "shall be computed upon the term of the sentence as imposed by the court, *including jail time allowance*" (emphasis added).

JURISDICTION

In the earlier opinion of the single district judge convening this three-judge court, *Royster* v. *McGinnis*, *supra*,

the court determined that plaintiffs had stated a cognizable claim under the Civil Rights Act over which the court had jurisdiction, and that the complaint stated a claim upon which relief could be granted. In that opinion substantial reliance was placed, as it is here in the interest of judicial economy, on a prior decision of this court in the case of *Phipps* v. *McGinnis*, —— F.Supp —— (S.D.N.Y. March 20, 1970), in which the precise question now before this three-judge court was presented.[6] In *Phipps*, as here, defendants claimed that the court lacked jurisdiction because plaintiff's suit, in effect, sought release from prison and, as such, attempted improperly to avoid the exhaustion requirements of 28 U.S.C. § 2254. At this point it need only be reemphasized that where a plaintiff seeks neither release from custody nor redress of alleged civil rights violations incurred in his state criminal proceedings, relief by way of habeas corpus is inappropriate. In the instant action, plaintiffs make no charge of unconstitutional detention resulting from illegalities in their state court trials. Nor is plaintiffs' complete or immediate liberty at stake, for even if plaintiffs were to secure earlier hearings before the Parole Board, the Board would still retain ultimate discretion to refuse them release on parole.[7]

What *is* clearly at stake, however, is the possible deprivation to plaintiffs of rights secured to them by the Constitution, namely, their right to equal treatment under the law, guaranteed by the Fourteenth Amendment. The Civil Rights Act creates a cause of action precisely to relieve such a deprivation, *Monroe* v. *Pape*, 365 U.S. 167 (1961), and state prisoners fall clearly within its protection. *Cooper* v. *Pate*, 378 U.S. 546 (1964); *Wright* v. *McMann*, 387 F.2d 519 (2d Cir. 1967); *Sewell* v. *Pegelow*, 291 F.2d 196 (4th Cir. 1961). Moreover, unlike the federal habeas corpus statute (28 U.S.C. § 2254), the Civil Rights Act, when properly relied upon for federal jurisdiction, does

not require the exhaustion of state judicial remedies *Wright* v. *McMann, supra,* 387 F.2d at 522-523. Thus, this court has jurisdiction of the issues raised by the complaint herein and may determine the merits.

THE MERIT OF THE COMPLAINT

The burden of plaintiffs' complaint is that Section 230(3) of the Correction Law violates the Fourteenth Amendment because it denies equal protection of the law to those persons who cannot afford to obtain bail (or are not granted bail) between arrest and sentence and so must serve time in jail awaiting judgment. Plaintiffs argue that whereas those fortunate enough to obtain bail prior to sentence are rewarded with a full allowance of good time credit for the entire period which they ultimately spend in custody (in state prison), those defendants (indigent and otherwise) who are jailed between arrest and sentence because of their inability to furnish bail are denied good time credit for the time spent in county jail and must content themselves with the partial measure of credit allotted to them for the period of their state prison confinement alone. Such a difference in treatment between persons sentenced to state prison for like terms of imprisonment smacks of discrimination on its face.

Thus, the real question, and indeed the only question before the court is whether a rational basis exists for the distinction made by § 230(3) between jail and non-jail defendants in the awarding of good time credit. We find the requisite rationality lacking. It is true that the Equal Protection Clause requires only that "the State's action be rational based and free from invidious discrimination." *Dandridge* v. *Williams,* 397 U.S. 471, 487 (1969). Indeed even though a state's practice may be discriminatory and

substantially harm those who are the subject of the discrimination, the practice may still be constitutionally permissible if it serves a valid governmental objective. Thus, for example, although the requirement of bail pending trial substantially discriminates against the indigent defendant, such a classification of "jail versus bail" is constitutionally sanctioned by the Eighth Amendment as a reasonable means for insuring a defendant's appearance in court. See, e.g., *Morris* v. *Crumlish*, 239 F.Supp. 498, 500 (E.D. Pa. 1965). Nevertheless, while laws may create such distinctions and classifications, they must be related to the purposes of the law itself, and artificial distinctions not so reasonably related will not be countenanced.

It is defendants' position that state prisons differ from county jails in respect to purpose, use and availability of facilities and that the exclusion of jail time in the computation of good time is therefore altogether reasonable and proper. They point out that state prisons (unlike county jails, which exist primarily as detention facilities) are designed to serve the additional goal of rehabilitation, and as a result maintain long-term educational and vocational programs (absent from the county jail system) to meet that end. Defendants contend that good time is granted as an incentive to the inmates to participate in these prison rehabilitation programs and that, since county jails are not equipped to provide such services, there is no basis for granting good time for time served therein. If it were clear that the awarding of good time was based solely and exclusively on an evaluation of an inmate's performance in such programs so endemic to the state prison system, the denial of good time for jail might be understandable; however, this does not appear to be the case. Rather, it seems that the overriding consideration in the granting of good time reductions is the maintenance of prison discipline. Defendants themselves have

observed upon the legislature's recognition of good time credit as "an effective disciplinary device" (Defendants' Memorandum, p. 20), and indeed, a New York state court, even though upholding the constitutionality of § 230(3), has stated:

> "The policy underlying the discretionary grant of good time reductions is clear. The attitude and conduct of prisoners should improve if they are offered an incentive for good and productive behavior while at the same time the fact that reductions can be withheld will inhibit bad conduct." *Perez* v. *Follette*, 58 Misc.2d 319, 321, 295 N.Y.S.2d 231, 233 (Sup.Ct., Dutchess County, 1968); aff'd 31 A.D.2d 600, 295 N.Y.S.2d 608; motion for leave to appeal dismissed as moot, 23 N.Y.2d 737, 296 N.Y.S.2d 569 (1968).

That good time is granted primarily as an incentive for good behavior and as a deterrent to misconduct is demonstrated in other more practical ways as well. Surely the state's argument is undercut when it is realized that a prisoner is immediately and automatically credited with a maximum allowance of good time credit for *future* good behavior at the time his minimum parole date is initially fixed upon his arrival in state prison. In effect, then, a prisoner does not "earn" good time credit as time goes on for exemplary performance in assorted prison programs but rather simply avoids being penalized for bad behavior. Indeed, Section 235[8] expressly provides that good time may be withheld in whole or in part as "punishment for offenses *against the discipline* of the prison or penitentiary" (emphasis added), and that unless credit is so withheld as punishment, the "[r]eduction credited to a prisoner in the first instance, . . ., shall stand as the reduction allowed."

Defendants' position is also undermined by the fact that the state *does* grant good time credit for pre-sentence jail time both in the case of the county penitentiary inmate and in the case of the indeterminate sentence prisoner's statutory release date from state prison.[9] As the convening court observed,

> "In both instances jail time is included in the computation of a prisoner's good time allowance despite the fact that the type of activity required of an inmate to earn good time credit in a county penitentiary or in state prison is allegedly vastly different from that which could be required of an individual incarcerated in county jail." *Royster* v. *McGinnis*, supra, —— F.Supp. at ——.

Defendants attempt to explain this anomaly by suggesting that, since release of a state prisoner at the time of his statutory release date (that is, prior to the *maximum* date of his indeterminate sentence) and release of a county penitentiary inmate (that is, one convicted of a non-felony offense) do not require the Parole Board to make nearly so sensitive an evaluation of a prisoner's conduct and potential for early release as it must in deciding to release a prisoner prior to the expiration of his *minimum* term set by a sentencing judge, the legislature[10] could reasonably decide to grant such prisoners credit for good conduct in county jail regardless of the evaluation time lost to the Parole Board as a result thereof.

Whatever the merit in defendants' attempted distinction (see below), the fact remains that state prisoners can be, and, under certain circumstances, are, granted good time credit for jail time for reasons other than as a reward for participation in the various rehabilitative programs of the state prison system. The awarding of good time for jail time to these two classes of prisoners only reinforces the

belief that the legislature's primary aim in enacting the good time statute was to foster and insure the maintenance of prison discipline. If this be the case, as it clearly seems to be, the particular time or place of an inmate's incarceration would be irrelevant to a determination of his maximum good time allowance, for the granting of good time credit for time served *both* before and after sentencing, whether by county jail or state prison authorities, "would serve the greater goal of inducing good behavior by the prisoners throughout the total period of their confinement." *Phipps* v. *McGinnis*, supra, —— F.Supp. at —— (March 20, 1970).

In this regard it should be noted that plaintiffs' requested change in the method of computing good time credit for minimum release could undoubtedly be accomplished without imposing great expense or administrative burden upon the state. County jail officials could simply certify to state prison authorities whether or not a particular prisoner is entitled to good time credit for the time he spent in the county institution. In fact, as the convening court observed earlier, "whatever method is now used by state authorities to compute the good time allowance of a county penitentiary prisoner, or, indeed, of an indeterminate sentence prisoner for purposes of his statutory release, could seemingly be employed here as well." *Royster* v. *McGinnis*, supra, —— F.Supp. at ——.[11]

Thus, while it may be technically true that state officials have no jurisdiction, at least from an administrative point of view, over inmates awaiting trial in county jails, it is grossly unfair that "plaintiffs and other prisoners like them should be made to bear the yoke of unequal and prolonged confinement merely because of the administrative division of labor between county and state prison authorities." *Royster* v. *McGinnis*, supra, —— F.Supp. at ——. Certainly this is all the more so where, as here, county

officials are fully able and equipped to help state authorities achieve the *legislative* goal of prisoner discipline at all correctional levels and the *constitutional* goal of equal treatment under the law. In a case such as this, involving the deprivation of rights secured by the Fourteenth Amendment, both state and county institutions must surely be deemed agencies of the same state government. A distinction in the allowance of good time credit cannot rationally be drawn based upon the type of institution in which the incarceration occurs.

Defendants make one further argument for rationality based upon the purported difference in roles between state prison and local jail officials. They contend that, since it is the state (and not the county) correction authorities who must ultimately make the sensitive decision whether to release a prisoner prior to the expiration of his minimum sentence, the granting of good time (which, in turn, leads to an earlier minimum parole date) should be based solely on the personal evaluation of a prisoner's conduct by state officials while he is actually confined in their custody. In other words, good time credit should not be awarded for jail time because it will result in a prisoner being released on parole before state authorities have had an adequate opportunity to pass upon his readiness therefor. Such fears are wholly illusory, however, for the mere granting of good time credit for jail time need not inhibit state officials in any way in the execution of their admittedly delicate duties. The awarding of good time in and of itself in no way compels the Parole Board to release a prisoner before it has had sufficient time to evaluate him and assure itself of his amenability to parole.[12] Indeed, it is quite possible that, even if a prisoner had been under the careful eye of state prison authorities for the entire period of his incarceration and had earned good time credit throughout such period, the Board might

still feel that he should not be released (and, in fact, would not have to release him) at the time of his minimum parole date. Thus, while the Parole Board's actual decision to release a prisoner on parole should certainly be based on adequate personal observation and evaluation by the releasing officials themselves,[13] the mere decision to award a prisoner good time for time spent in county jail need not be so based since the granting of good time (whether for time served in jail *or* prison) is simply not synonymous with actual release from prison—at least in the case of minimum release. Indeed, Section 213 specifically provides that:

> "Discretionary release on parole shall *not* be granted merely as a reward for good conduct or efficient performance of duties assigned in prison, but only if the board of parole is of opinion that there is reasonable probability that, if such prisoner is released, he will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society." (emphasis added).

Defendants' final contention—that plaintiffs are really not challenging the good time provisions of § 230 but rather the consequences of the bail system—was fully considered in the opinion of the convening court, and this court adopts those conclusions.[14]

Class Action

The requirements of Rule 23, Fed.R.Civ.P., having been met, plaintiffs' request for the declaration of a class action is granted. The class which plaintiffs seek to represent is so numerous that joinder of all members is impracticable; there are questions of law and fact common to the class;

he claims of the representative parties are typical of the laims of the class; the representative parties will protect, nd in fact have protected, fairly and adequately the inter- sts of the class; and the defendants have acted on grounds enerally applicable to the class, thereby making appro- riate final injunctive and declaratory relief with respect o the class as a whole. That this suit should be main- ained as a class action is demonstrated by defendants' wn representation that "any final decisions by the federal courts declaring the provision of the statute unconsti- tutional would be accepted and implemented by the state not only with respect to plaintiffs, but with respect to all prisoners whose time is computed pursuant to the statu- tory provision" in question. (Defendants' Memorandum, p. 41). Defendants' suggestion (rather inconsistent with the latter representation) that class relief is inappropriate here because "[m]any prisoners no doubt have received sentences which take into account the fact that good time cannot be earned on jail time" (Defendants' Memorandum, p. 41) is without any support in the record and altogether hypothetical. In view of the constitutional deprivation imposed on plaintiffs and their class by § 230(3), this court cannot simply "presume" that any, let alone all, of the numerous sentencing courts involved meticulously ad- justed the sentences they imposed to compensate for the statutory denial of good time credit (often of only a few days duration) here declared unconstitutional.

Inasmuch as it would be impracticable and potentially disruptive of prison routine to require that notice be given to class members of plaintiffs' action and the decision herein, and inasmuch as notice is not necessary "for the protection of the members of the class or otherwise for the fair conduct of the action," Rule 23(d), Fed.R.Civ.P., notice to the members of the class need not be given. Indeed it is difficult to imagine that any member of the class would "opt out" if he were given notice.

Opinion of the Three Judge District Court, filed August 23, 1971.

In view of the foregoing, § 230(3) of the New York Correction Law, insofar as it denies good time credit for jail time to indeterminate sentence prisoners in the computation of their minimum release dates, is hereby declared unconstitutional, and defendants will be permanently enjoined and restrained from enforcing it so as to deny such credit to plaintiffs and members of their class. The class is defined to include all prisoners who are presently serving indeterminate sentences[1] in state prison for offenses committed prior to September 1, 1967, who served time in county jail prior to trial and sentence to state prison, who have not yet reached their minimum release date, and who have not as yet elected the conditional release program under § 230-a of the Correction Law.

Submit decree on notice.

Dated: New York, New York
August , 1971

.....
U.S.C.J.

.....
U.S.C.J.

MORRIS E. LASKER
U.S.D.J.

Filed
Aug 23, 1971

FOOTNOTES

[1] See Penal Law, § 2193(1), repealed as of September 1, 1967, but in effect at the time plaintiffs were committed to state prison. Section 2193(1) has been replaced in the new Penal Law by § 70.30 (3).

Opinion of the Three Judge District Court, filed August 23, 1971.

[3] We are here concerned with an "indeterminate sentence," that is, a "sentence to imprisonment in a state prison having minimum and maximum limits fixed by the court." Correction Law, § 230(1).

[4] See *People* v. *Deegan*, 56 Misc.2d 567, 289 N.Y.S.2d 285 (Sup.Ct., Westchester County, 1968); *Paul* v. *Warden of the Suffolk County Jail* (New York Law Journal, May 21, 1969, at p. 18, col. 6).

[5] For a more extensive analysis of the relationship between §§ 230(3) and (4), as well as the pertinent provisions of the new Penal Law and the new chapters of the Correction Law, see footnote 2 in the opinion of the convening court herein, *Royster* v. *McGinnis*, supra, —— F.Supp. ——. It should be noted, however, that the statutory scheme of § 230, which is the subject of this lawsuit, is no longer the law in New York. On September 1, 1967, § 230 was replaced by §§ 803 and 805 of the Correction Law and §§ 70.30 and 70.40 of the new Penal Law, which sections apply to all convictions for offenses committed *on or after that date* (but not to convictions—as of plaintiffs herein—for offenses committed *prior to* the effective date).

Thus, the scope of this case (and of the proposed class) is necessarily limited, for the challenged statute, § 230(3) of the Correction Law, now applies only to those prisoners who were convicted for offenses committed before September 1, 1967, whose minimum terms have not yet expired, who have not yet met with the Parole Board, and who have not yet elected the "conditional release" program offered by the new law and made available to old law prisoners by § 230-a of the Correction Law. Of these prisoners, a smaller class yet—comprised of those inmates who served time in county jail prior to sentence to state prison—actually feel the effect of § 230(3)'s proscription against good time credit for jail time. Nevertheless, the briefs in this case attest to the continuing effect of that mandate on a substantial number of individuals.

[6] Such penitentiaries are county correctional institutions maintained, in general, for the confinement of persons convicted of non-felony offenses carrying sentences of one year or less.

[7] In *Phipps*, a three-judge court eventually dismissed the case as moot because by that time the plaintiff had already appeared before the Parole Board for consideration for minimum release. *Phipps* v. *McGinnis*, 69 Civ. 3236 (S.D.N.Y., May 13, 1970). The court, therefore, did not reach the merits.

Opinion of the Three Judge District Court, filed August 23, 1971.

[7] Plaintiff's loss is nevertheless quite real, for, as stated in *United States ex rel. Campbell* v. *Pate*, 401 F.2d 55, 57 (7th Cir. 1968):

> "What he is losing, . . ., is the possibility that if he appeared before the board he might persuade it to decide in his favor. Of course this loss, in practical, human, terms is serious and involves a chance for at least qualified liberty."

In any event, whatever the value to plaintiffs of this *chance* for qualified liberty, it is hardly the equivalent of actual release from custody and as such is distinguishable from recent decisions of our Court of Appeals, *Rodriguez* v. *McGinnis*, —— F.2d ——, Dkt. No. 34567 (2d Cir., March 16, 1971); *United States ex rel. Katsof* v. *McGinnis*, —— F.2d ——, Dkt. No. 35300 (2d Cir., March 29, 1971), holding that where release from penal custody is sought, the habeas corpus statute—and not the Civil Rights Act—provides the appropriate remedy and requires the exhaustion of state remedies.

[8] Section 235 (as well as the other provisions of Article 9 of the Correction Law) was repealed as of the 60th day after May 8, 1970, but it and most of the other provisions here relevant continue to apply in cases—such as plaintiffs'—where the sentence involved is for an offense committed prior to September 1, 1967, the effective date of the new Penal Law. See note under § 230, Correction Law (McKinney Supp. 1970).

[9] Indeed, at oral argument, the court was informed that when state prisoners are returned, subsequent to their original transfer to state prison, to county authorities in connection with court appearances on post-trial writs of coram nobis, they are granted good time credit for such jail time as well.

[10] The history of § 230 reveals that, at least with regard to the computation of a prisoner's statutory release date under § 230(4), it was the courts—and not the legislature—which decided that good time credit must be granted for time served in county jail. See the cases cited in footnote 3 above and accompanying text.

[11] Significantly enough, a close reading of the Correction Law suggests that an administrative mechanism for the computation of a state prisoner's good time credit for jail time for purposes of minimum release has long been available to defendants, and that county jail officials themselves have been long accustomed to judging their own prisoners' eligibilty for good time credit under a statutory standard almost identical to that imposed upon state cor-

rection authorities by § 230. See Correction Law, §§ 250, 252, now repealed but still applicable in cases where the sentence involved is for an offense committed prior to September 1, 1967, and note under §§ 250-254, Correction Law (McKinney Supp. 1970). Nor would there appear to be any difficulty involved in the transfer of an inmate's *good time* record from county jail to state prison authorities, for county officers have for many years been required to deliver to state authoriites, upon a prisoner's commitment and transfer to state prison, very similar records regarding such prisoner's *jail time* credit. See § 2193(1) of the old Penal Law and § 489-a of the Code of Criminal Procedure.

[12] As the convening court noted, "If the Board should feel that there has not been sufficient time for evaluation by state officials of the prisoner's conduct and his potential for early release, it can simply refuse to release him, and, barring an excessive abuse of discretion in this regard, such a sensitive determination would not be subject to judicial review." *Royster* v. *McGinnis*, supra, —— F.Supp. at ——.

[13] It is interesting to note that the sensitive decision to release a prisoner on parole is not even made by those correction authorities who have actually had the prisoner under their supervision during the period of his state prison incarceration. Rather, this determination is vested solely within the discretion of the Parole Board under the criteria set forth in § 213 infra. The Department of Correction, by awarding the requisite good time, merely certifies that the particular prisoner is legally *eligible* for parole consideration.

[14] It should be noted that the court has not relied on the indigence of the plaintiffs or their class members in holding § 230(3) to have created an unreasonable classification. The invidious discrimination here is not necesarily between the rich and the poor, but rather between the jailed and the non-jailed. Of course, in reality, the weight of pre-sentence incarceration falls most heavily on the indigent, but it is certainly not reserved for him alone.

[15] The rationale of this decision would appear to apply with equal force to "definite sentence" prisoners—that is, those prisoners sentenced to a "sentence to imprisonment in a state prison for a definite fixed period of time," § 230(1)—who are similarly denied good time credit for jail time by § 230(3). This issue, however, has not been raised in the instant litigation, and such prisoners have therefore been omitted from the class.

Opinion of the Three Judge District Court, filed August 23, 1971.

Hays, Circuit Judge, dissenting:

If a classification made by a state has some reasonable basis it does not violate the equal protection clause. *Dandridge* v. *Williams*, 397 U.S. 471 (1970).

There seems to me to be a reasonable ground for distinguishing in the award of good time credit between time spent in state prison under the supervision of the state prison authorities and time spent in county jail under the supervision of local authorities. It was surely not wholly arbitrary for the legislature to provide that the Parole Board should have the power to act upon a prisoner's application only after the prisoner has spent a fixed proportion of his sentence in a place where his conduct has been under the observation of state prison officials rather than in a local jail.

Under the guise of applying constitutional principles federal judges are increasingly taking over from the states the administration of state prison systems. In this case, as in a number of others recently decided, the assumption of these new duties appears to be based rather on the judges' conviction that they can administer state prisons more wisely than can the state authorities, and not on any compelling constitutional considerations.

Order of United States District Court Entered October 15, 1971.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

ORDER

70 Civ. 4365

JAMES ROYSTER, PERCY RUTHERFORD, and all other persons similarly situated,

Plaintiffs,

against

PAUL D. MCGINNIS, Commissioner of Correction, State of New York, HARRY FRITZ, Warden, Auburn Prison, Auburn, New York, J. L. CASSCLES, Warden, Ossining Correctional Facility, Ossining, New York,

Defendants.

A complaint having come before the United States District Court, Southern District, brought under 42 U.S.C. §1983, with federal jurisdiction predicated on 28 U.S.C. §1343(3), an oral hearing had thereon, on March 3, 1971, before the Honorable Paul R. Hays, United States Circuit Judge, the Honorable Morris E. Lasker, District Judge, and the Honorable Charles M. Metzner, District Judge. After duly considering all of the evidence including the oral argument for plaintiffs and defendants and the memoranda of law submitted thereby, an opinion of the Honorable Morris E. Lasker, United States District Judge, for the Southern District of New York, having been filed on August 23, 1971, declaring (1) that the declaration of a class action, defined to include all prisoners who are presently serving indeterminate sentences in state prison for

offenses committed prior to September 1, 1967, who served time in county jail prior to trial and sentence to state prison, who have not yet reached their minimum release program under § 230-a of the Correction Law, is granted; (2) that § 230(3) of the New York Correction Law, insofar as it denies good time credit for jail time to indeterminate sentence prisoners in the computation of their minimum release dates is unconstitutional; and (3) that defendants Paul D. McGinnis, Commissioner of Correction, State of New York, Harry Fritz, Warden, Auburn Prison, Auburn, New York, and J. L. Casscles, Warden, Ossining Correctional Facility, Ossining, New York, be permanently enjoined and restrained from enforcing § 230(3) of the New York Correction Law so as to deny such credit to plaintiffs and members of their class. It is hereby

ORDERED AND ADJUDGED that § 230(3) of the New York Correction Law, insofar as it denies good time credit for jail time to indeterminate sentence prisoners in the computation of their minimum release dates, is hereby declared unconstitutional, and it is further

ORDERED AND ADJUDGED that the defendants, Paul D. McGinnis, Commissioner of Correction, State of New York, Harry Fritz, Warden, Auburn Prison, Auburn, New York, and J. L. Casscles, Warden, Ossining Correctional Facility, Ossining, New York are permanently enjoined and restrained from enforcing § 230(3) of the New York Correction Law so as to deny good time credit for jail time served in county jail prior to trial and sentence to state prison to indeterminate sentence prisoners in the computation of their minimum release date, and it is further

ORDERED AND ADJUDGED that the declaration of a class action is hereby granted, the class defined to include all

Order of United States District Court Entered October 15, 1971.

prisoners who are presently serving indeterminate sentences in state prison for offenses committed prior to September 1, 1967, who served time in county jail prior to trial and sentence to state prison, who have not yet reached their minimum release date, and who have not as yet elected the conditional release program under § 230-a of the Correction Law, and it is further

ORDERED AND ADJUDGED that the mandate of this Court be stayed pending the disposition of defendants' appeal to the United States Supreme Court *provided that* said relief be sought within 30 days of the order granting the stay or within such time as may be granted by the Supreme Court upon application to that Court for a further stay.

Dated: New York, New York
October 12, 1971

.....
U. S. D. J.

/s/ CHARLES M. METZNER
U. S. D. J.

/s/ MORRIS E. LASKER
U. S. D. J.

Although I dissent from the decision of the court in this case, I join in the order as correctly representing that decision.

October 13, 1971 /s/ PAUL R. HAYS
U.S.C.J.

Judgment entered 10/15/71

/s/ JOHN LIVINGSTON
Clerk

Notice of Appeal, Filed November 12, 1971.

UNITED STATES DISTRICT COURT,

Southern District of New York.

70 Civ. 4365

James Royster, Percy Rutherford and all other persons similarly situated,

Plaintiffs,

against

Paul D. McGinnis, Commissioner of Correction, State of New York, Harry Fritz, Warden, Auburn Prison, Auburn, New York, J. L. Casscles, Warden, Ossining Correctional Facility, Ossining, New York,

Defendants.

Notice of Appeal to the Supreme Court of the United States

Notice is hereby given that Paul D. McGinnis, Harry Fritz and J. L. Casscles, defendants in this action, hereby appeal to the Supreme Court of the United States from the final order granting a declaratory judgment and a permanent injunction, entered in this action on October 14, 1971.

This appeal is taken pursuant to 28 U.S.C. § 1253.

Louis J. Lefkowitz
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State of New York
Attorney for Defendants
Office & P. O. Address
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New York, New York 10013

By

/s/
Michael Colodner
Assistant Attorney General

Order of United States District Court, dated November 12, 1971.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

70 CIV. 4365

ORDER

JAMES ROYSTER, PERCY RUTHERFORD, and all other persons similarly situated,

Plaintiffs,

against

PAUL D. MCGINNIS, Commissioner of Correction, State of New York, HARRY FRITZ, Warden, Auburn Prison, Auburn, New York, J. L. CASSCLES, Warden, Ossining Correctional Facility, Ossining, New York,

Defendants.

A complaint having come before the United States District Court, Southern District, brought under 42 U.S.C. § 1983 challenging the constitutionality of section 230(3) of the New York Correction Law, and after briefs filed and arguments presented an order having been signed and dated October 14, 1971 declaring said section unconstitutional and permanently enjoining its enforcement, and said order further containing a stay of the mandate of the Court pending the disposition of defendants' appeal to the United States Supreme Court provided that said relief be sought within 30 days of the order granting the stay, and said 30 days being about to expire on November 13, 1971, it is hereby

Order of United States District Court, dated November 12, 1971.

ORDERED AND ADJUDGED that the mandate of this Court be stayed pending the disposition of defendants' appeal to the United States Supreme Court *provided that* said relief be sought by November 26, 1971 or within such time as may be granted by the Supreme Court upon application to that Court for a further stay.

Dated: New York, New York, November 12, 1971

/s/ MORRIS E. LASKER
U.S.D.J.

/s/ CHARLES M. METZNER
U.S.D.J.

/s/ PAUL R. HAYS
U.S.C.J.

Supreme Court of the United States

No. 71-718

Paul D. McGinnis, Commissioner of Correction, State of New York, et al.,

Appellants,

v.

James Royster, et al.

APPEAL from the United States District Court for the Southern District of New York.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

March 20, 1972

(51458)

FILE COPY

Supreme Court, U.S.
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E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-718

PAUL D. MCGINNIS, Commissioner of Correction, State of New York, HARRY FRITZ, Warden, Auburn Prison, Auburn, New York, J. L. CASSCLES, Warden, Ossining Carrectional Facility, Ossining, New York,

Appellants,

against

JAMES ROYSTER, PERCY RUTHERFORD and all other persons similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No.

PAUL D. MCGINNIS, Commissioner of Correction, State of New York, HARRY FRITZ, Warden, Auburn Prison, Auburn, New York, J. L. CASSCLES, Warden, Ossining Carrectional Facility, Ossining, New York,

Appellants,

against

JAMES ROYSTER, PERCY RUTHERFORD and all other persons similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

This is an appeal from an order of the United States District Court for the Southern District of New York which declared unconstitutional and permanently enjoined the enforcement of Section 230(3) of the New York Correction Law.

Opinions Below

The opinions of the District Court have not yet been reported. The opinion convening a three-judge court is set

forth as Appendix D, *infra*, pp. 6a-22a. The opinion of the three-judge court is set forth as Appendix E, *infra*, pp. 23a-33a. The order appealed from is reproduced at page 3a.

Jurisdiction

The order of the District Court was entered on October 15, 1971, and notice of appeal was filed in that Court on November 12, 1971. The jurisdiction of the Supreme Court to review this case on direct appeal is conferred by 28 U.S.C. §§ 1253 and 2101(a).

Question Presented

Whether that portion of New York Correction Law § 230(3) that allows credit for good behavior to be computed upon the minimum term of an indeterminate sentence less jail time allowance violates the Constitution because it treats prisoners in prisons under the jurisdiction of the State of New York different from defendants in jails awaiting trial and court disposition, such jails being under the jurisdiction of the counties of New York State.

Statute Involved

Section 230 of the New York Correction Law states in part as follows:

> "3. In the case of a definite sentence prisoner, said reduction shall be computed upon the term of the sentence as imposed by the court, less jail time allowance, and *in the case of an indeterminate sentence prisoner, said reduction shall be computed upon the minimum term of such sentence, less jail time allowance.* No prisoner, however, shall be released under the provisions hereof from a state prison until he shall have served at least one year. In the case of a

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prisoner confined in a penitentiary, said reduction shall be computed upon the term of the sentence as imposed by the court, including jail time allowance. Subject to the rules of the commissioner of correction, the maximum reduction of ten days in each month may, in the discretion of the board hereinafter provided for, be in whole or in part withheld, forfeited or cancelled, in accordance with the rules of the commissioner of correction for bad conduct, violation of prison rules or failure to perform properly duties assigned." (Emphasis added)

Statement of the Case

Appellees instituted an action in the District Court under U.S.C. § 1983 and 28 U.S.C. § 1343(3) for judgment eclaring unconstitutional and enjoining the enforcement Section 230(3) of the New York Correction Law relatg to the awarding of credit for good behavior in state risons. The section attacked the awarding of credit for ood behavior on the minimum term of an indeterminate entence without giving good time credit on any pre-trial ncarceration spent in a county jail awaiting trial and disosition on the charge that resulted in that sentence. Apellees alleged that this differentiation between defendants county jails and prisoners in state prisons was invidious iscrimination between those who could and those who ould not post bail prior to trial.

Appellants opposed this application and submitted an ffidavit by Deputy Commissioner of Correction John R. Cain stating that the reason good time is not awarded to ersons in county jails is because the state must be in a osition of supervising and evaluating prisoner behavior n a state program before it awards such good time [Appenix F, p. 36a]. By decision dated January 21, 1971, he District Court granted plaintiffs' application for the onvening of a three-judge court [Appendix D, pp. 23a-33a].

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On March 3, 1971, a three-judge court was convened, and by decision filed on August 23, 1971, the court held, 2-1, that Section 230(3) was unconstitutional and permanently enjoined the enforcement of said provision. The majority held that there was no rational basis for the distinction made by that Section between jail and non-jail defendants in the awarding of good time. While conceding that state prisons differed in purpose, usage and availability of facilities from county jails, the majority held that good time was granted primarily as an incentive for good behavior and that the State could adequately fulfill any supervisory needs in awarding this good time through other methods. The dissent stated that it was not wholly arbitrary for the State to allow the Parole Board to have the power to act upon a prisoner's application for parole only after he had spent a fixed proportion of his sentence in a place where his conduct had been under the observation of state prison officials.

The mandate of the District Court was stayed pending final determination by this Court provided that defendants perfected their appeal within 30 days of the entry of the final order. This time limitation was later extended until November 26, 1971.

The Statutory Plan

Section 230 of the Correction Law (Appendix G) is part of a statutory plan of allowing prisoners to earn "good time" on their sentence while in state prison. Jail time while awaiting trial and disposition is credited to every prisoner who has been in the county jails. New York Penal Law, § 2193. This case concerns only the extra "good time" allowance which is given by statute only for the period that the prisoner is in state prison. Even in cases where time spent in jail before disposition was not credited to a prisoner's sentence, the courts have

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held that this result "is not sufficiently invidious to reach constitutional proportions." *Valcarcel* v. *United States*, 409 F. 2d 211, 213 (2d Cir. 1969); *Sobell* v. *Attorney General*, 400 F. 2d 986, 990 (3rd Cir. 1968), *cert. den.* 393 U.S. 940.

The system operated by having the Department of Correction calculate a series of release dates, which are given to each prisoner at the time he arrives at state prison. These dates are as follows:

1. *"Minimum parole date"*—a date calculated upon the greatest amount of good time that can be earned against the *maximum* sentence of an indeterminate term under section 230(2) and 230(3) which is the earliest date on which an inmate can be paroled at the *discretion* of the Parole Board.

2. *"Statutory release date"*—a date calculated upon the greatest amount of good time that can be earned against the maximum sentence of an indeterminate term under section 230(4) which is the earliest date on which an inmate *must* be paroled by the Parole Board.

3. *"Maximum expiration date"*—the date of the maximum of a sentence to which an inmate can be held if he receives no good time credit at all.

The date at issue in this action is the "minimum parole date". A prisoner may receive a reduction of his sentence not to exceed 10 days for each month of his minimum term [Section 230(2)]. In reality, however, an inmate does not "earn" this time as each month passes; instead, the greatest possible amount of his good time credit, calculated at one-third of the minimum sentence is deducted from his sentence immediately upon arrival in prison, and the only changes in this allowance occur when

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penalties are inflicted (see Section 235). [Thus, a prisoner with a minimum sentence of 3 years would be given a minimum parole date of 2 years, which theoretically could not be "earned" at the rate of 10 days a month or 4 months a year].

The problem in this case is that Section 230(3) directs that this minimum parole date be calculated "less jail time allowance". The Department calculates the date at one-third off the time derived by first subtractiong from the minimum sentence the amount of time spent in jail prior to coming to prison. When this minimum date arrives, the Department of Parole then decides in its discretion whether the inmate should be paroled. No provision for any "good time" allowance for the period prior to confinement in state prison is authorized because by its very nature good time only applies to confinement after conviction.

It should be noted that the District Court took jurisdiction under § 1983 despite the fact that on September 1, 1967, Section 230 of the Correction Law was replaced by Sections 803 and 805 of the Correction Law and Section 70.30 and 70.40 of the new Penal Law, which apply to all convictions had *after* that date. Under the new statutory scheme, good time earned on the minimum sentence is abolished. A prisoner meets with the Parole Board at the expiration of his minimum term regardless of how much good time he has earned or of how much time he spent in jail prior to arriving at state prison [Correction Law, § 805(3), Penal Law § 70.40(1)(a)]. At that meeting, the Parole Board determines in its discretion whether to release the prisoner on parole. Good time is now calculated off the maximum term of the sentence, regardless of jail time [Correction Law, §§ 803(1); 805(1); Penal Law §§ 70.30(4); 70.40(1)(b)].

However, persons imprisoned prior to September 1, 1967 have an opportunity, at any time, to elect to serve

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eir sentence under the provisions of the new Penal Law d the new chapters of the Correction Law, and so be igible for "conditional release" [Correction Law, 30-a]. If they do not make this election, the old section 0(3) still applies. Both plaintiffs have not elected the w law procedures.

ARGUMENT

This appeal presents substantial questions requiring plenary consideration by this Court.

By substituting its judgment for that of the New York Legislature, the decision of the three-judge District Court completely ignored the equal protection standards set forth by this Court, and the opinion raises serious questions concerning the role of the federal courts in reviewing the enactments of State Legislatures.

The distinction made by Section 230(3) of the New York orrection Law is that good time on a state sentence is be awarded on the minimum term of an indeterminate ntence only for time spent under state supervision in a ate prison, and not for the time spent outside of state pervision in a county jail*. This distinction is based on e undisputed fact that state prisons differ from county

*The courts have all held except for the instant case that the ght to earn "good time" credit while in prison is not a federal ght, and that the denial of the applicability of good time to jail me while in the local jail is not the denial of a federal right. ouglas v. *Sigler*, 386 F. 2d 684, 686 (8th Cir. 1967); *Quirke* v. tto, 373 F. 2d 739 (5th Cir. 1967); *Burns* v. *Crouse*, 339 F. 2d 3 (10th Cir. 1964); *Lipschitz* v. *State*, 43 N. J. Super. 522, 129 . 2d 466 (1957).

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jails with respect to purpose, usage and availability of facilities**.

State prisons come directly under the supervision of state correction authorities, whereas county jails are supervised by local officials. It is these state authorities who must eventually make the difficult and sensitive decision of whether to release a prisoner into society before he serves his sentence. This requires that close contact be maintained with the prisoner, that uniform standards of evaluation be created and that a suitable program of activity be followed to allow for evaluation [see Appendix F, p. 36a]. State officials have no jurisdiction at all over inmates in county jails who are awaiting trial and, if acquitted or otherwise released, will never even come under the jurisdiction of the state correctional institutions.

These differences allow for different treatment within a constitutional framework. The Constitution does not require that things different in fact be treated in law as though they are the same. *Tigner* v. *Texas,* 310 U.S. 141, 147 (1940).

The majority of the District Court did not challenge the existence of these differences, nor did the Court reject the uncontested allegations of appellants as to the need for state supervision to award good time. What the majority

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** The state prisons are intended to have rehabilitation as a prime purpose. The facilities at these institutions are built and equipped to serve this purpose. State prisons serve as essentially permanent residences for prisoners as they serve out their sentences. The prisons are thus able to create and maintain long-term educational and vocational services such as schools, factories, job-training programs and related activities. [See affidavit of Deputy Commissioner John R. Cain, Appendix F, p. 36a].

On the other hand, county jails exist solely as detention facilities and serve no other purpose. They are neither equipped nor intended to do anything other than hold people awaiting trial. They maintain no schools, run no factories and require no work from the inmates.

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held was that the need for state supervision was not the "primary" reason for the awarding of good time [Appendix D, p. 14a]. It found that the awarding of good time was "primarily" [Appendix D, p. 12a] an incentive for good behavior, and therefore saw no reason why good time could not be awarded for time spent in county jails. The District Court refused to consider the supervisory aspects of good time because the awarding of good time was not based "solely and exclusively" [Appendix D, p. 11a] on the evaluation of a prisoner's performance in a state prison program.* Such reasoning has been condemned by this Court. See *Palmer* v. *Thompson*, —— U.S. ——, 29 L. Ed. 2d 438, 444-45 (decided June 14, 1971).

The majority below has created an equal protection standard that has no basis in any of the decisions by this Court. It has stated in effect that a statutory distinction will be upheld only if it is supported by what it considers to be the primary reason for the making of the distinction.

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*The persons in the county jails awaiting trials or other disposition are not adjudicated prisoners. They are defendants clothed with the constitutional presumption of innocence. There would be no right or possibility of instituting a work program or engaging in any other program of rehabilitation. They only become prisoners when they have been convicted and sentenced to a state prison. The equation of defendants confined awaiting such disposition with convicted persons is clearly erroneous. Moreover, of course, the State does not supervise the conduct of any of the defendants awaiting such disposition.

The ruling of the District Court is calculated to impose on the State the unprecedented burden of taking over such supervision of every local jail in the State. The problem of determining what branch of government could best administer detention facilities has recently been given deep consideration by the Advisory Commission on Intergovernmental Relations, a national commission established by Act of Congress [Public Law 380], and the Commission recommended that jails and detention facilities continue to be administered by localities, and not by the states. *State-Local Relations in the Criminal Justice System*, Advisory Commission on Intergovernmental Relations, Washington, D. C., August, 1971, pp. 55-56.

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This is squarely in contradiction to the uniform ruling of this Court that a distinction made by a state statute must be upheld "if *any* state of facts *can conceivably* justify it" (Emphasis added), *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1969); *McGowan* v. *Maryland*, 366 U.S. 420, 426 (1961), and is in conflict with the cases in other circuits which have dealt with the same aspect (*supra*, p. 7 fn.).

It is true that an inmate who serves time in a county jail prior to conviction may meet the Parole Board a few months later than an inmate serving the same sentence who was not incarcerated prior to trial.* However, the fact that a statute might disadvantage a particular class does not mean that it denies equal protection. *James* v. *Valtierra*, —— U.S. ——, 28 L. Ed. 2d 678, 683 (decided April 26, 1971). A statutory distinction must be upheld if it has a rational basis and does not result in invidious discrimination.** *Dandridge* v. *Williams*, *supra*, 397 U.S. at 486.

Appellants presented a clear valid reason for the distinction made in section 230(3)—that since it is the state correction authorities who must ultimately make the sensitive decision of whether to release a prisoner prior to the expiration of his minimum sentence, the granting of good time leading to an earlier minimum release should be based solely on the personal evaluation of a prisoner's conduct by state officials while he is actually confined in their cus-

---

* Plaintiff Royster spent 404 days in jail prior to sentence and thus claims his minimum release date should be set about four months earlier. Plaintiff Rutherford spent 242 days in jail prior to sentence and claims his minimum release date should be set about three months earlier.

** The District Court did not decide whether the discrimination was invidious for any reason other than it lacked a rational basis [see Appendix D, p. 21a, fn. 14].

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ly. [See Appendix D, p. 15a.]* The majority below
l not contest this reason, but decided that the encourage-
nt of good behavior was a more compelling reason, and
forth alternative ways of how state officials might be
le to fulfill the goal of supervising while awarding good
e on time spent in county jails [Appendix D, pp. 14a-
a]. This is a blatant imposition of the District Court's
n philosophy of penology and is the very judicial activity
rbidden by this Court.

This Court has consistently held that a federal court
nnot strike down a state statute because it has a different
ew as to what would be a wiser statutory scheme. *Dand-
dge* v. *Williams, supra,* 397 U.S. at 485-486. See also
orvell v. *Illinois,* 373 U.S. 420, 424 (1963). As this Court
ost recently stated (*Labine* v. *Vincent,* —— U.S. ——,
3 L. Ed. 2d 288 [decided March 29, 1971]) [28 L. Ed. 2d at
93]:

> "The Federal Constitution does not give this Court the power to overturn the State's choice under the guise of constitutional interpretation because the Justices of this Court believe that they can provide better rules."

---

*The state does grant good time credit for pre-sentence jail
me in the case of the county penitentiary inmate [Section 230(3)]
d in the case of the indeterminate sentence prisoner's statutory
lease date (calculated on the maximum term of the sentence).
Section 230(4)]. In these cases the need for personal supervision
nd evaluation before an inmate is released back into society is not
great—penitentiary inmates are serving terms for less serious
isdemeanors of under one year and the determination of release
n the maximum date of an indeterminate sentence clearly is a less
ensitive decision requiring less evaluation than that of release prior
o the minimum term that a sentencing judge determined was the
ery least amount of time that a convicted felon should serve. The
ajority below did not reject these reasons, but rather pointed out
hat they help to show that the "primary aim" of the statute was
o foster prison discipline [Appendix D, p. 14a].

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The court below is not entitled to implement its own conception of penal philosophy by advising the State of New York how it could best implement an alternative statutory scheme and still preserve all of its original goals. As this Court stated in *Labine* v. *Vincent, supra,* [28 L. Ed. at 294]:

> "It may be possible that some of these choices are more 'rational' than the choices [made by the state Legislature]. . . . Absent a specific constitutional guarantee, it is for that legislature, not the life-tenured judges of this Court, to select from among possible laws".

Indeed, much of the reasoning of the majority below attacking the rationality of Section 230(3) is based upon the majority's conception that the supervisory aspect of good time is minimal because the Parole Board would still have the discretion to refuse to release any prisoner who had earned sufficient good time on his minimum sentence [Appendix D, p. 15a]. The court below fails to recognize that the Legislature did not intend that the Parole Board be *allowed* to exercise its discretion until after a prescribed minimum amount of state supervision had elapsed. The majority cannot substitute its own judgment for that of a state legislature as to the criteria by which a state agency should operate. As the dissent correctly indicates, the decision below is based solely "on the judges' convictions that they can administer state prisons more wisely than the state authorities, and not on any compelling constitutional considerations" [Appendix D, p. 22a].

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CONCLUSION

The questions presented by this appeal are substantial and of broad public importance. Probable jurisdiction should therefore be noted.

Dated: New York, New York, November 22, 1971.

Respectfully submitted,

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Appendix A, Notice of Appeal Filed November 12, 1971.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Paul D. McGinnis, Harry Fritz and J. L. Casscles, defendants in this action, hereby appeal to the Supreme Court of the United States from the final order granting a declaratory judgment and a permanent injunction, entered in this action on October 15, 1971.

This appeal is taken pursuant to 28 U.S.C. § 1253.

LOUIS J. LEFKOWITZ,
Attorney General of the
State of New York,
Attorney for Defendants,
Office & P. O. Address,
80 Centre Street,
New York, New York 10013.

By /s/ MICHAEL COLODNER,
Assistant Attorney General.

Appendix B, Order of District Court Entered October 15, 1971.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

A complaint having come before the United States District Court, Southern District, brought under 42 U.S.C. § 1983, with federal jurisdiction predicated on 28 U.S.C. § 1343(3), an oral hearing had thereon, on March 3, 1971, before the Honorable Paul R. Hays, United States Circuit Judge, the Honorable Morris E. Lasker, District Judge, and the Honorable Charles M. Metzner, District Judge. After duly considering all of the evidence including the oral argument for plaintiffs and defendants and the memoranda of law submitted thereby, an opinion of the Honorable Morris E. Lasker, United States District Judge, for the Southern District of New York, having been filed on August 23, 1971, declaring (1) that the declaration of a class action, defined to include all prisoners who are presently serving indeterminate sentences in state prison for offenses committed prior to September 1, 1967, who served time in county jail prior to trial and sentence to state prison, who have not yet reached their minimum release program under § 230-a of the Correction Law, is granted; (2) that § 230(3) of the New York Correction Law, insofar as it denies good time credit for jail time to indeterminate sentence prisoners in the computation of their minimum release dates is unconstitutional; and (3) that defendants Paul D. McGinnis, Commissioner of Correction, State of New York, Harry Fritz, Warden, Auburn Prison, Auburn, New York, and J. L. Casscles, Warden, Ossining Correctional Facility, Ossining, New York, be permanently enjoined and restrained from enforcing § 230(3) of the New

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Appendix B, Order of District Court
Entered October 15, 1971.

ork Correction Law so as to deny such credit to plaintiffs nd members of their class. It is hereby

ORDERED AND ADJUDGED that § 230(3) of the New York orrection Law, insofar as it denies good time credit for il time to indeterminate sentence prisoners in the comutation of their minimum release dates, is hereby declared nconstitutional, and it is further

ORDERED AND ADJUDGED that the defendants, Paul D. Mcinnis, Commissioner of Correction, State of New York, arry Fritz, Warden, Auburn Prison, Auburn, New York, nd J. L. Casscles, Warden, Ossining Correctional Facility, ssining, New York are permanently enjoined and reained from enforcing § 230(3) of the New York Correcon Law so as to deny good time credit for jail time served county jail prior to trial and sentence to state prison to ndeterminate sentence prisoners in the computation of eir minimum release date, and it is further

ORDERED AND ADJUDGED that the declaration of a class acon is hereby granted, the class defined to include all prisers who are presently serving indeterminate sentences state prison for offenses committed prior to Septemr 1, 1967, who served time in county jail prior to trial nd sentence to state prison, who have not yet reached eir minimum release date, and who have not as yet ected the conditional release program under § 230-a of e Correction Law, and it is further

ORDERED AND ADJUDGED that the mandate of this Court be ayed pending the disposition of defendants' appeal to e United States Supreme Court *provided that* said re-

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lief be sought within 30 days of the order granting the stay or within such time as may be granted by the Supreme Court upon application to that Court for a further stay.

Dated: New York, New York, October 12, 1971.

.....
U.S.D.J.

/s/ CHARLES M. METZNER,
U.S.D.J.

/s/ MORRIS E. LASKER,
U.S.D.J.

Although I dissent from the decision of the court in this case, I join in the order as correctly representing that decision.

October 13, 1971.

/s/ PAUL R. HAYS,
U.S.C.J.

Judgment entered 10/15/71.

/s/ JOHN LIVINGSTON,
Clerk.

Appendix C, Order of District Court.

A complaint having come before the United States District Court, Southern District, brought under 42 U.S.C. §1983 challenging the constitutionality of section 230(3) of the New York Correction Law, and after briefs filed and arguments presented an order having been signed and dated October 14, 1971 declaring said section unconstitutional and permanently enjoining its enforcement, and said order further containing a stay of the mandate of the Court pending the disposition of defendants' appeal to the United States Supreme Court provided that said relief be sought within 30 days of the order granting the stay, and said 30 days being about to expire on November 13, 1971, it is hereby

ORDERED AND ADJUDGED that the mandate of this Court be stayed pending the disposition of defendants' appeal to the United States Supreme Court *provided that* said relief be sought by November 26, 1971 or within such time as may be granted by the Supreme Court upon application to that Court for a further stay.

Dated: New York, New York, November 15, 1971.

/s/ PAUL R. HAYS,
U.S.C.J.

/s/ CHARLES M. METZNER,
U.S.D.J.

/s/ MORRIS E. LASKER,
U.S.D.J.

Appendix D, Opinion of the Three Judge District Court.

LASKER, D. J.

Two New York State prisoners have brought this class action seeking a declaratory judgment that Section 230(3) of the New York Correction Law, under which their "good time" was computed, is unconstitutional and an injunction against the alleged discriminatory practices pursued by defendants in application of that statute.

Plaintiffs attack the constitutionality of the provision in § 230(3) which denies state prisoners good time credit for the period of their pre-sentence incarceration in county jail. They contend that the denial of such good time credit deprives them of equal protection in violation of the Fourteenth Amendment by discriminating against those prisoners who cannot afford or are not granted bail prior to trial and sentencing.

This suit is brought under 42 U.S.C. § 1983 (the Civil Rights Act), with federal jurisdiction predicated on 28 U.S.C. § 1343(3). By opinion and order dated January 21, 1971, this court, having found that a substantial constitutional question had been raised, granted plaintiff's application to convene a three-judge court. *Royster* v. *McGinnis*, —— F.Supp. —— (S.D.N.Y. January 21, 1971).

Plaintiffs James Royster and Percy Rutherford are inmates of the Auburn and Ossining Correction Facilities, respectively. They bring this action on behalf of themselves and other state prisoners similarly situated who have served terms of incarceration in county jail prior to their transfer to state prison but have not received good time credit therefor. Royster, having been unable to post the requisite bail bond at the time of arrest, served one year, one month and nine days, or 404 days ("jail time"), in the Nassau County Jail prior to his transfer to state prison to serve consecutive five to ten year terms for burglary in the third degree and grand larceny in the first

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degree. Rutherford also failed to make bail and, as a result, spent eight months and two days, or 242 days ("jail time"), in the Nassau County Jail prior to his trial, sentencing, and receipt in state prison to serve concurrent terms of ten to twenty years for robbery in the first degree and two and one-half to five years for grand larceny in the second degree.

Although plaintiffs did receive *jail time* credit against the terms of their sentences for the period of their county jail incarceration,[1] they did not receive, and under the provisions of § 230(3) were not entitled to receive, any *good behavior time* credit ("good time") for this period of detention served prior to transfer to state prison. Contending that they should have received good time credit for the jail time so served, plaintiffs now seek to compel defendants to recompute their "minimum release dates" (that is, the dates upon which they would first have the right to appear before the Parole Board). They point out, and it is not disputed, that were they to receive good time credit for time spent in county jail between arrest and sentence, they would be entitled to appear before the Parole Board several months (over four months, in Royster's case; nearly three months, in Rutherford's) earlier than they will under the computation required by § 230(3).

There is no doubt that by its express wording Section 230 mandates the denial of good time credit for the time plaintiffs served in county jail awaiting trial and sentencing. Subsection 2 thereof provides that a state prisoner may receive, "for good conduct and efficient and willing performance of duties assigned, a reduction of his sentence not to exceed ten days for each month of the minimum term in the case of an indeterminate sentence . . .,"[2] and subsection 3 states that "in the case of an indeterminate sentence prisoner said reduction shall be computed upon the minimum term of such sentence, *less jail time allowance.*" (em-

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phasis added). However, while jail time *is* excluded from the calculation of an indeterminate sentence prisoner's maximum good time allowance for purposes of determining his minimum release (or parole) date under § 230(3), it is *not* excluded from such computation when it comes to setting the same prisoner's "statutory release date" pursuant to subsection 4 of Section 230. The latter date is the earliest date on which an inmate *must* be paroled by the Parole Board and is arrived at by deducting a prisoner's total good time allowance (five days per month) from the *maximum* term of his indeterminate sentence. By contrast, the minimum release date signifies the earliest date on which an inmate *may* be paroled at the discretion of the Parole Board, and it is computed by deducting the prisoner's total good time credit (ten days per month) from the *minimum* term of his indeterminate sentence.

It is significant that the New York courts[3] have construed § 230(4) (which, unlike § 230(3), does not contain the same explicit language denying good time credit for jail time) to require that good time credits earned thereunder be allowed not only for time served in state prison but also for presentence jail time.[4] Similarly, § 230(3) itself provides that in the case of prisoners confined in county penitentiaries,[5] as opposed to those confined in state prisons, good time reductions "shall be computed upon the term of the sentence as imposed by the court, *including jail time allowance.*" (emphasis added).

JURISDICTION

In the earlier opinion of the single district judge convening this three-judge court, *Royster* v. *McGinnis*, supra, the court determined that plaintiffs had stated a cognizable claim under the Civil Rights Act over which the court had

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jurisdiction, and that the complaint stated a claim upon which relief could be granted. In that opinion substantial reliance was placed, as it is here in the interest of judicial economy, on a prior decision of this court in the case of *Phipps* v. *McGinnis,* —— F.Supp. —— (S.D.N.Y. March 20, 1970), in which the precise question now before this three-judge court was presented.[6] In *Phipps,* as here, defendants claimed that the court lacked jurisdiction because plaintiff's suit, in effect, sought release from prison and, as such, attempted improperly to avoid the exhaustion requirements of 28 U.S.C. § 2254. At this point it need only be reemphasized that where a plaintiff seeks neither release from custody nor redress of alleged civil rights violations incurred in his state criminal proceedings, relief by way of habeas corpus is inappropriate. In the instant action, plaintiffs make no charge of unconstitutional detention resulting from illegalities in their state court trials. Nor is plaintiffs' complete or immediate liberty at stake, for even if plaintiffs were to secure earlier hearings before the Parole Board, the Board would still retain ultimate discretion to refuse them release on parole.[7]

What *is* clearly at stake, however, is the possible deprivation to plaintiffs of rights secured to them by the Constitution, namely, their right to equal treatment under the law, guaranteed by the Fourteenth Amendment. The Civil Rights Act creates a cause of action precisely to relieve such a deprivation, *Monroe* v. *Pape,* 365 U.S. 167 (1961), and state prisoners fall clearly within its protection. *Cooper* v. *Pate,* 378 U.S. 546 (1964); *Wright* v. *McMann,* 387 F.2d 519 (2d Cir. 1967); *Sewell* v. *Pegelow,* 291 F.2d 196 (4th Cir. 1961). Moreover, unlike the federal habeas corpus statute (28 U.S.C. § 2254), the Civil Rights Act, when properly relied upon for federal jurisdiction, does not require the exhaustion of state judicial remedies.

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Wright v. *McMann*, supra, 387 F.2d at 522-523. Thus, this court has jurisdiction of the issues raised by the complaint herein and may determine the merits.

THE MERIT OF THE COMPLAINT

The burden of plaintiffs' complaint is that Section 230(3) of the Correction Law violates the Fourteenth Amendment because it denies equal protection of the law to those persons who cannot afford to obtain bail (or are not granted bail) between arrest and sentence and so must serve time in jail awaiting judgment. Plaintiffs argue that whereas those fortunate enough to obtain bail prior to sentence are rewarded with a full allowance of good time credit for the entire period which they ultimately spend in custody (in state prison), those defendants (indigent and otherwise) who are jailed between arrest and sentence because of their inability to furnish bail are denied good time credit for the time spent in county jail and must content themselves with the partial measure of credit allotted to them for the period of their state prison confinement alone. Such a difference in treatment between persons sentenced to state prison for like terms of imprisonment smacks of discrimination on its face.

Thus, the real question, and indeed the only question, before the court is whether a rational basis exists for the distinction made by § 230(3) between jail and non-jail defendants in the awarding of good time credit. We find the requisite rationality lacking. It is true that the Equal Protection Clause requires only that "the State's action be rationally based and free from invidious discrimination." *Dandridge* v. *Williams*, 397 U.S. 471, 487 (1969). Indeed, even though a state's practice may be discriminatory and substantially harm those who are the subject of the discrimination, the practice may still be constitu-

tionally permissible if it serves a valid governmental objective. Thus, for example, although the requirement of bail pending trial substantially discriminates against the indigent defendant, such a classification of "jail versus bail" is constitutionally sanctioned by the Eighth Amendment as a reasonable means for insuring a defendant's appearance in court. See, e.g., *Morris* v. *Crumlish*, 239 F.Supp. 498, 500 (E.D. Pa. 1965). Nevertheless, while laws may create such distinctions and classifications, they must be related to the purposes of the law itself, and artificial distinctions not so reasonably related will not be countenanced.

It is defendants' position that state prisons differ from county jails in respect to purpose, usage and availability of facilities and that the exclusion of jail time in the computation of good time is therefore altogether reasonable and proper. They point out that state prisons (unlike county jails, which exist primarily as detention facilities) are designed to serve the additional goal of rehabilitation, and as a result maintain long-term educational and vocational programs (absent from the county jail system) to meet that end. Defendants contend that good time is granted as an incentive to the inmates to participate in these prison rehabilitation programs and that, since county jails are not equipped to provide such services, there is no basis for granting good time for time served therein. If it were clear that the awarding of good time was based solely and exclusively on an evaluation of an inmate's performance in such programs so endemic to the state prison system, the denial of good time for jail time might be understandable; however, this does not appear to be the case. Rather, it seems that the overriding consideration in the granting of good time reductions is the maintenance of prison discipline. Defendants themselves have ob-

served upon the legislature's recognition of good time credit as "an effective disciplinary device" (Defendants' Memorandum, p. 20), and indeed, a New York state court, even though upholding the constitutionality of § 230(3), has stated:

> "The policy underlying the discretionary grant of good time reductions is clear. The attitude and conduct of prisoners should improve if they are offered an incentive for good and productive behaviour while at the same time the fact that reductions can be withheld will inhibit bad conduct." *Perez* v. *Follette*, 58 Misc.2d 319, 321, 295 N.Y.S.2d 231, 233 (Sup.Ct., Dutchess County, 1968); aff'd 31 A.D.2d 600, 295 N.Y.S.2d 608; motion for leave to appeal dismissed as moot, 23 N.Y.2d 737, 296 N.Y.S.2d 569 (1968).

That good time is granted primarily as an incentive for good behavior and as a deterrent to misconduct is demonstrated in other more practical ways as well. Surely the state's argument is undercut when it is realized that a prisoner is immediately and automatically credited with a maximum allowance of good time credit for *future* good behavior at the time his minimum parole date is initially fixed upon his arrival in state prison. In effect, then, a prisoner does not "earn" good time credit as time goes on for exemplary performance in assorted prison programs but rather simply avoids being penalized for bad behavior. Indeed, Section 235[8] expressly provides that good time may be withheld in whole or in part as "punishment for offenses *against the discipline* of the prison or penitentiary" (emphasis added), and that unless credit is so withheld as punishment, the "[r]eduction credited to a prisoner in the first instance, . . . , shall stand as the reduction allowed."

Defendants' position is also undermined by the fact that ie state *does* grant good time credit for pre-sentence jail me both in the case of the county penitentiary inmate nd in the case of the indeterminate sentence prisoner's tatutory release date from state prison.[9] As the convening ourt observed,

> "In both instances jail time is included in the computation of a prisoner's good time allowance despite the fact that the type of activity required of an inmate to earn good time credit in a county penitentiary or in state prison is allegedly vastly different from that which could be required of an individual incarcerated in county jail." *Royster* v. *McGinnis*, supra, —— F.Supp. at ——.

efendants attempt to explain this anomaly by suggesting iat, since release of a state prisoner at the time of his atutory release date (that is, prior to the *maximum* date f his indeterminate sentence) and release of a county enitentiary inmate (that is, one convicted of a non-felony ffense) do not require the Parole Board to make nearly sensitive an evaluation of a prisoner's conduct and otential for early release as it must in deciding to rease a prisoner prior to the expiration of his *minimum* rm set by a sentencing judge, the legislature[10] could asonably decide to grant such prisoners credit for good nduct in county jail regardless of the evaluation time st to the Parole Board as a result thereof.

Whatever the merit in defendants' attempted distinction ee below), the fact remains that state prisoners can be, d, under certain circumstances, are, granted good time edit for jail time for reasons other than as a reward for rticipation in the various rehabilitative programs of the ate prison system. The awarding of good time for jail

time to these two classes of prisoners only reinforces the belief that the legislature's primary aim in enacting the good time statute was to foster and insure the maintenance of prison discipline. If this be the case, as it clearly seems to be, the particular time or place of an inmate's incarceration would be irrelevant to a determination of his maximum good time allowance, for the granting of good time credit for time served *both* before and after sentencing, whether by county jail or state prison authorities, "would serve the greater goal of inducing good behavior by the prisoners throughout the total period of their confinement." *Phipps* v. *McGinnis*, supra, —— F. Supp. at —— (March 20, 1970).

In this regard it should be noted that plaintiffs' requested change in the method of computing good time credit for minimum release could undoubtedly be accomplished without imposing great expense or administrative burden upon the state. County jail officials could simply certify to state prison authorities whether or not a particular prisoner is entitled to good time credit for the time he spent in the county institution. In fact, as the convening court observed earlier, "whatever method is now used by state authorities to compute the good time allowance of a county penitentiary prisoner, or, indeed, of an indeterminate sentence prisoner for purposes of his statutory release, could seemingly be employed here as well." *Royster* v. *McGinnis*, supra, —— F.Supp. at ——.[11]

Thus, while it may be technically true that state officials have no jurisdiction, at least from an administrative point of view, over inmates awaiting trial in county jails, it is grossly unfair that "plaintiffs and other prisoners like them should be made to bear the yoke of unequal and prolonged confinement merely because of the administrative division of labor between county and state prison authori-

ties." *Royster* v. *McGinnis*, supra, —— F.Supp. at ——. Certainly this is all the more so where, as here, county officials are fully able and equipped to help state authorities achieve the *legislative* goal of prisoner discipline at all correctional levels and the *constitutional* goal of equal treatment under the law. In a case such as this, involving the deprivation of rights secured by the Fourteenth Amendment, both state and county institutions must surely be deemed agencies of the same state government. A distinction in the allowance of good time credit cannot rationally be drawn based upon the type of institution in which the incarceration occurs.

Defendants make one further argument for rationality based upon the purported difference in roles between state prison and local jail officials. They contend that, since it is the state (and not the county) correction authorities who must ultimately make the sensitive decision whether to release a prisoner prior to the expiration of his minimum sentence, the granting of good time (which, in turn, leads to an earlier minimum parole date) should be based solely on the personal evaluation of a prisoner's conduct by state officials while he is actually confined in their custody. In other words, good time credit should not be awarded for jail time because it will result in a prisoner being released on parole before state authorities have had an adequate opportunity to pass upon his readiness therefor. Such fears are wholly illusory, however, for the mere granting of good time credit for jail time need not inhibit state officials in any way in the execution of their admittedly delicate duties. The awarding of good time in and of itself in no way compels the Parole Board to release a prisoner before it has had sufficient time to evaluate him and assure itself of his amenability to parole.[12] Indeed, it is quite possible that, even if a prisoner had been under

the careful eye of state prison authorities for the entire period of his incarceration and had earned good time credit throughout such period, the Board might still feel that he should not be released (and, in fact, would not have to release him) at the time of his minimum parole date. Thus, while the Parole Board's actual decision to release a prisoner on parole should certainly be based on adequate personal observation and evaluation by the releasing officials themselves,[13] the mere decision to award a prisoner good time for time spent in county jail need not be so based since the granting of good time (whether for time served in jail *or* prison) is simply not synonymous with actual release from prison—at least in the case of minimum release. Indeed, Section 213 specifically provides that:

> "Discretionary release on parole shall *not* be granted merely as a reward for good conduct or efficient performance of duties assigned in prison, but only if the board of parole is of opinion that there is reasonable probability that, if such prisoner is released, he will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society." (emphasis added)

Defendants' final contention—that plaintiffs are really not challenging the good time provisions of § 230 but rather the consequences of the bail system—was fully considered in the opinion of the convening court, and this court adopts those conclusions.[14]

Class Action

The requirements of Rule 23, Fed.R.Civ.P., having been met, plaintiffs' request for the declaration of a class action is granted. The class which plaintiffs seek to repre-

sent is so numerous that joinder of all members is impracticable; there are questions of law and fact common to the class; the claims of the representative parties are typical of the claims of the class; the representative parties will protect, and in fact have protected, fairly and adequately the interests of the class; and the defendants have acted on grounds generally applicable to the class, thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole. That this suit should be maintained as a class action is demonstrated by defendants' own representation that "any final decisions by the federal courts declaring the provision of the statute unconstitutional would be accepted and implemented by the state not only with respect to plaintiffs, but with respect to all prisoners whose time is computed pursuant to the statutory provision" in question. (Defendants' Memorandum, p. 41). Defendants' suggestion (rather inconsistent with the latter representation) that class relief is inappropriate here because "[m]any prisoners no doubt have received sentences which take into account the fact that good time cannot be earned on jail time" (Defendants' Memorandum, p. 41) is without any support in the record and altogether hypothetical. In view of the constitutional deprivation imposed on plaintiffs and their class by § 230(3), this court cannot simply "presume" that any, let alone all, of the numerous sentencing courts involved meticulously adjusted the sentences they imposed to compensate for the statutory denial of good time credit (often of only a few days duration) here declared unconstitutional.

Inasmuch as it would be impracticable and potentially disruptive of prison routine to require that notice be given to class members of plaintiffs' action and the decision herein, and inasmuch as notice is not necessary "for the protection of the members of the class or otherwise for

the fair conduct of the action," Rule 23(d), Fed.R.Civ.P., notice to the members of the class need not be given. Indeed it is difficult to imagine that any member of the class would "opt out" if he were given notice.

In view of the foregoing, § 230(3) of the New York Correction Law, insofar as it denies good time credit for jail time to indeterminate sentence prisoners in the computation of their minimum release dates, is hereby declared unconstitutional, and defendants will be permanently enjoined and restrained from enforcing it so as to deny such credit to plaintiffs and members of their class. The class is defined to include all prisoners who are presently serving indeterminate sentences[18] in state prison for offenses committed prior to September 1, 1967, who served time in county jail prior to trial and sentence to state prison, who have not yet reached their minimum release date, and who have not as yet elected the conditonal release program under § 230-a of the Correction Law.

Submit decree on notice.

Dated: New York, New York, August , 1971.

.....
U.S.C.J.

.....
U.S.D.J.

MORRIS E. LASKER,
U.S.D.J.

FILED

AUG 23, 1971

Appendix D, Opinion of the Three Judge District Court.

[1] See Penal Law, § 2193(1), repealed as of September 1, 1967, but in effect at the time plaintiffs were committed to state prison. Section 2193(1) has been replaced in the new Penal Law by § 70.30(3).

[2] We are here concerned with an "indeterminate sentence," that is, a "sentence to imprisonment in a state prison having minimum and maximum limits fixed by the court." Correction Law, § 230(1).

[3] See *People* v. *Deegan*, 56 Misc. 2d 567, 289 N.Y.S.2d 285 (Sup. Ct., Westchester County, 1968); *Paul* v. *Warden of the Suffolk County Jail* (New York Law Journal, May 21, 1969, at p. 18, col. 6).

[4] For a more extensive analysis of the relationship between §§ 230(3) and (4), as well as the pertinent provisions of the new Penal Law and the new chapters of the Correction Law, see footnote 2 in the opinion of the convening court herein, *Royster* v. *McGinnis*, supra, —— F.Supp. ——. It should be noted, however, that the statutory scheme of § 230, which is the subject of this lawsuit, is no longer the law in New York. On September 1, 1967, § 230 was replaced by §§ 803 and 805 of the Correction Law and §§ 70.30 and 70.40 of the new Penal Law, which sections apply to all convictions for offenses committed *on or after that date* (but not to convictions—as of plaintiffs herein—for offenses committed *prior to* the effective date).

Thus, the scope of this case (and of the proposed class) is necessarily limited, for the challenged statute, § 230(3) of the Correction Law, now applies only to those prisoners who were convicted for offenses committed before September 1, 1967, whose minimum terms have not yet expired, who have not yet met with the Parole Board, and who have not yet elected the "conditional release" program offered by the new law and made available to old law prisoners by § 230-a of the Correction Law. Of these prisoners, a smaller class yet—comprised of those inmates who served time in county jail prior to sentence to state prison—actually feel the effect of § 230(3)'s proscription against good time credit for jail time. Nevertheless, the briefs in this case attest to the continuing effect of that mandate on a substantial number of individuals.

[5] Such penitentiaries are county correctional institutions maintained, in general, for the confinement of persons convicted of non-felony offenses carrying sentences of one year or less.

[6] In *Phipps*, a three-judge court eventually dismissed the case as moot because by that time the plaintiff had already appeared before

the Parole Board for consideration for minimum release. *Phipps* v. *McGinnis*, 69 Civ. 3236 (S.D.N.Y., May 13, 1970). The court, therefore, did not reach the merits.

[7] Plaintiff's loss is nevertheless quite real, for, as stated in *United States ex rel. Campbell* v. *Pate*, 401 F.2d 55, 57 (7th Cir. 1968):

> "What he is losing, . . ., is the possibility that if he appeared before the board he might persuade it to decide in his favor. Of course this loss, in practical, human, terms is serious and involves a chance for at least qualified liberty."

In any event, whatever the value to plaintiffs of this *chance* for qualified liberty, it is hardly the equivalent of actual release from custody and as such is distinguishable from recent decisions of our Court of Appeals, *Rodriguez* v. *McGinnis*, —— F.2d ——, Dkt. No. 34567 (2d Cir., March 16, 1971); United States ex rel. *Katzoff* v. *McGinnis*, —— F.2d ——, Dkt. No. 35300 (2d Cir., March 29, 1971), holding that where release from penal custody is sought, the habeas corpus statute—and not the Civil Rights Act—provides the appropriate remedy and requires the exhaustion of state remedies.

[8] Section 235 (as well as the other provisions of Article 9 of the Correction Law) was repealed as of the 60th day after May 8, 1970, but it and most of the other provisions here relevant continue to apply in cases—such as plaintiffs'—where the sentence involved is for an offense committed prior to September 1, 1967, the effective date of the new Penal Law. See note under § 230, Correction Law (McKinney Supp. 1970).

[9] Indeed, at oral argument, the court was informed that when state prisoners are returned, subsequent to their original transfer to state prison, to county authorities in connection with court appearances on post-trial writs of coram nobis, they are granted good time credit for such jail time as well.

[10] The history of § 230 reveals that, at least with regard to the computation of a prisoner's statutory release date under § 230(4), it was the courts—and not the legislature—which decided that good time credit must be granted for time served in county jail. See the cases cited in footnote 3 above and accompanying text.

[11] Significantly enough, a close reading of the Correction Law suggests that an administrative mechanism for the computation of a state prisoner's good time credit for jail time for purposes of minimum release has long been available to defendants, and that county jail officials themselves have been long accustomed to judg-

ing their own prisoners' eligibility for good time credit under a statutory standard almost identical to that imposed upon state correction authorities by § 230. See Correction Law, §§ 250, 252, now repealed but still applicable in cases where the sentence involved is for an offense commited prior to September 1, 1967, and note under §§ 250-254, Correction Law (McKinney Supp. 1970). Nor would there appear to be any difficulty involved in the transfer of an inmate's *good time* record from county jail to state prison authorities, for county officers have for many years been required to deliver to state authorities, upon a prisoner's commitment and transfer to state prison, very similar records regarding such prisoner's *jail time* credit. See § 2193(1) of the old Penal Law and § 489-a of the Code of Criminal Procedure.

[13] As the convening court noted, "If the Board should feel that there has not been sufficient time for evaluation by state officials of the prisoner's conduct and his potential for early release, it can simply refuse to release him, and, barring an excessive abuse of discretion in this regard, such a sensitive determination would not be subject to judicial review." *Royster* v. *McGinnis*, supra, —— F.Supp. at——.

[14] It is interesting to note that the sensitive decision to release a prisoner on parole is not even made by those correction authorities who have actually had the prisoner under their supervision during the period of his state prison incarceration. Rather, this determination is vested solely within the discretion of the Parole Board under the criteria set forth in § 213 infra. The Department of Correction, by awarding the requisite good time, merely certifies that the particular prisoner is legally *eligible* for parole consideration.

[15] It should be noted that the court has not relied on the indigence of the plaintiffs or their class members in holding § 230(3) to have created an unreasonable classification. The invidious discrimination here is not necessarily between the rich and the poor, but rather between the jailed and the non-jailed. Of course, in reality, the weight of pre-sentence incarceration falls most heavily on the indigent, but it is certainly not reserved for him alone.

[16] The rationale of this decision would appear to apply with equal force to "definite sentence" prisoners—that is, those prisoners sentenced to a "sentence to imprisonment in a state prison for a definite fixed period of time," § 230(1)—who are similarly denied good time credit for jail time by § 230(3). This issue, however, has not been raised in the instant litigation, and such prisoners have therefore been omitted from the class.

Appendix D, Opinion of the Three Judge District Court.

Hays, Circuit Judge, dissenting:

If a classification made by a state has some reasonable basis it does not violate the equal protection clause. *Dandridge* v. *Williams*, 397 U.S. 471 (1970).

There seems to me to be a reasonable ground for distinguishing in the award of good time credit between time spent in state prison under the supervision of the state prison authorities and time spent in county jail under the supervision of local authorities. It was surely not wholly arbitrary for the legislature to provide that the Parole Board should have the power to act upon a prisoner's application only after the prisoner has spent a fixed proportion of his sentence in a place where his conduct has been under the observation of state prison officials rather than in a local jail.

Under the guise of applying constitutional principles federal judges are increasingly taking over from the states the administration of state prison systems. In this case, as in a number of others recently decided, the assumption of these new duties appears to be based rather on the judges' conviction that they can administer state prisons more wisely than can the state authorities, and not on any compelling constitutional considerations.

Appendix E, Opinion Convening Three Judge District Court.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

LASKER, D. J.

Plaintiffs James Royster and Percy Rutherford, New York State prisoners in the Auburn and Ossining Correction Facilities, respectively, bring this class action on behalf of themselves and others similarly situated seeking a declaratory judgment that Section 230(3) of the New York Correction Law, under which their "good time" was computed, is unconstitutional, and for an injunction against the alleged discriminatory practices pursued by defendants in application of that statute.

This suit is brought under 42 U.S.C. § 1983 (the "Civil Rights Act") invoking the jurisdiction of this court pursuant to 28 U.S.C. § 1343(3). Plaintiffs now move for the convocation of a three-judge district court under 28 U.S.C. § 2281, 2284, to consider the allegations of unconstitutionality and enjoin enforcement of the state statute in question.

Plaintiff Royster was indicted by a Nassau County Court grand jury on June 15, 1965. Upon failing to post a $3,000 bail bond (later increased to $7,500 to cover a second indictment), he was remanded to the Nassau County Jail. He was thereafter convicted of burglary in the third degree and grand larceny in the first degree, after a trial by jury, in the Supreme Court, Nassau County. On May 20, 1966, he was sentenced to consecutive sentences of five to ten years on each count, and on May 26, 1966 he was received in state prison. Prior to the latter date, he had spent one year, one month and nine days, or 404 days ("jail time"), in the Nassau County Jail, beginning with the date of his arrest on April 17, 1965.

Appendix E, Opinion Convening Three Judge District Court.

Plaintiff Rutherford was indicted on January 25, 1966 by the Nassau County Court grand jury and held in $5,000 bail, which he was not able to post. He was convicted, after a jury trial, in the Supreme Court, Nassau County, and sentenced on November 1, 1966, to concurrent terms of ten to twenty years for robbery in the first degree and two and one-half to five years for grand larceny in the second degree, and a suspended sentence on each of two assault, second degree convictions. By the time he was received in state prison on November 4, 1966, plaintiff Rutherford had spent eight months and two days, or 242 days ("jail time"), in the Nassau County Jail awaiting trial and sentencing.

Although both plaintiffs were entitled to, and did, receive *jail time* credit against the terms of sentence imposed upon them for the period of their incarceration in county jail (Penal Law, § 2193(1)), they did not receive, and under the provisions of Section 230(3) of the Correction Law were not entitled to receive, *good behavior time credit* ("good time credit") for this period of detention served in county jail prior to transfer to state prison.

Plaintiffs contend that if they had received good time credit for the time spent in county jail between arrest and sentence, they would be entitled to appear before the Parole Board several months (in Royster's case, over four months; in Ruthorford's, nearly three months) earlier than they will be under the state's present computation pursuant to the language of Section 230(3). Plaintiffs therefore bring this action to compel defendants to recompute their "minimum release dates" (that is, the dates upon which they would first have the right to appear before the Parole Board), contending that they should receive good time credit for the time served in jail prior to their reception at their respective state prisons. Plaintiffs urge that the

withholding from them of good time credit for the period of their incarceration in county jail deprives them of equal protection of the laws in violation of the Fourteenth Amendment in that such a method of computing good time discriminates against those prisoners who cannot afford or, in some cases, are not even granted, bail while awaiting trial and sentencing.

That Section 230 of the Correction Law sanctions and, indeed, requires the denial of good time credit for the time plaintiffs served in jail seems clear from the face of the statute. Subsection 2 thereof provides that a state prisoner may receive, "for good conduct and efficient and willing performance of duties assigned, a reduction of sentence not to exceed ten days for each month of the minimum term in the case of an indeterminate sentence . . .,"[1] and subsection 3 states that "in the case of an indeterminate sentence prisoner said reduction shall be computed upon the minimum term of such sentence, *less jail time allowance.*" (Emphasis added.) It is on the basis of the statutory formula set forth in these two subsections that an indeterminate sentence prisoner's minimum release (or parole) date is calculated, and it is this method of computation that, plaintiffs claim, deprives them of equal protection of the laws. It should be noted, however, that jail time is *not* excluded from the computation of a prisoner's maximum good time allowance for purposes of determining his "statutory release date" pursuant to subsection 4 of Section 230. This date, which is arrived at by deducting a prisoner's good time allowance from the *maximum* term (not the minimum term, as in the case of the minimum release date) of an indeterminate sentence, is the earliest date on which an inmate *must* be paroled by the Parole Board (unlike the minimum release date, which is the earliest date on which an inmate *can* be paroled at the

discretion of the Parole Board). And the New York courts have construed Section 230(4) (which, unlike Section 230(3), does not contain the same explicit language denying credit for jail time) to require that good time credits earned thereunder be allowed not only for time served in state prison but also for pre-sentence jail time.[2] Similarly, Section 230(3) itself provides that in the case of prisoners confined in county penitentiaries,[3] as opposed to those confined in state prisons, good time reductions "shall be computed upon the term of the sentence as imposed by the court, including *jail time allowance.*" (Emphasis added.)

The issue here raised is identical to the question presented to this court recently in the case of *Phipps* v. *McGinnis*, 69 Civ. 3236 (S.D.N.Y.). In two unreported decisions (which are annexed hereto and are dated March 20, 1970 and April 13, 1970, respectively), I found that plaintiff had stated a cognizable claim under the Civil Rights Act and that this court had jurisdiction thereof, that the complaint (which was substantially similar to the one here in issue) stated a claim upon which relief could be granted, and, finally, that a substantial constitutional question had been raised requiring the convening of the three-judge district court.[4] I still adhere to these views, and, in the interest of brevity, reference is made without further comment to the earlier opinions.

Inasmuch as the state has adduced substantially more authority in support of its position in these cases than it did at the time of the *Phipps* case, however, a comment is in order on the several bases now suggested by defendants for upholding the rationality of the distinction made by Section 230(3) between jail and non-jail defendants with regard to the awarding of good time credit.

Defendants contend that since county jails and state prisons differ in both their intended goals and available

facilities, the deduction of jail time in determining good time is eminently reasonable and logical. Whereas, defendants claim, state correctional facilities are designed to serve a three-fold purpose of imposing punishment, protecting society and, most importantly, rehabilitating the inmate, county jails exist primarily as detention facilities to restrict prisoners awaiting trial. Similarly, defendants argue, whereas the facilities in state prisons are equipped to provide long-term educational and vocational programs with good time granted as an incentive to the inmates to participate in these programs, county jails are not equipped to provide such services and consequently there is no opportunity to evaluate an inmate's performance, nor need to encourage his participation, in such programs. Nevertheless, defendants acknowledge that the overriding consideration in the granting of good time reductions is the maintenance of prison discipline. (Defendants' Memorandum of Law, dated November 9, 1970, at p. 15). Indeed, a New York state court which upheld the constitutionality of Section 230(3) has stated:

> "The policy underlying the discretionary grant of good time reductions is clear. The attitude and conduct of prisoners should improve if they are offered an incentive for good and productive behavior while at the same time the fact that reductions can be withheld will inhibit bad conduct." *Perez* v. *Follette*, 58 Misc.2d 319, 321, 295 N.Y.S.2d 231, 233 (Sup. Ct., Dutchess County, 1968); aff'd 31 A.D.2d 600, 295 N.Y.S.2d 608; motion for leave to appeal dismissed as moot, 23 N.Y.2d 737, 296 N.Y.S.2d 569 (1968).

If the legislative purpose of this statute was, as it clearly seems to have been, to encourage good conduct on the part of prisoners, the particular time or place of their incarcera-

tion would not appear to be a relevant consideration. Rather, "it would seem that awarding good time credit for time served *both* before and after sentencing, whether by jail or prison authorities, would serve the greater goal of inducing good behavior by the prisoners throughout the total period of their confinement." *Phipps* v. *McGinnis*, supra, 69 Civ. 3236 (S.D.N.Y. March 20, 1970, at p. 9). In addition, even assuming as true the asserted disparity in goals and facilities between the two types of institutions, the state itself apparently experiences little difficulty in granting good time credit for pre-sentence jail time both in the case of the county penitentiary inmate and in the case of the indeterminate sentence prisoner's statutory release date from state prison. In both instances jail time is included in the computation of a prisoner's good time allowance despite the fact that the type of activity required of an inmate to earn good time credit in a county penitentiary or in state prison is allegedly vastly different from that which could be required of an individual incarcerated in county jail. Finally, it should be noted that plaintiffs' requested change in the method of good time computation for purposes of minimum release could probably be implemented without major difficulty simply by having county jail authorities certify at the time of a prisoner's receipt in state prison whether or not he is entitled to good time credit for the time he passed in county jail. In fact, whatever method is now used by state authorities to compute the good time allowance of a county penitentiary prisoner, or, indeed, of an indeterminate sentence prisoner for purposes of his statutory release, could seemingly be employed here as well. It would not appear equitable that plaintiffs and other prisoners like them should be made to bear the yoke of unequal and prolonged confinement merely because of the administrative division of labor between county and state prison authorities.

Defendants also argue that, since county jails are supervised by local officials and not, like state prisons, by state correction authorities, and since it is these state officials who must eventually make the sensitive decision whether to release a prisoner prior to the expiration of his minimum sentence or not, the granting of good time (which, in turn, determines a prisoner's minimum parole date) should be made only on the basis of personal observation and evaluation of the prisoner's conduct by state officials while he is actually confined in their custody in state prison. But this difficulty, if real, can be easily overcome. If the Board should feel that there has not been sufficient time for evaluation by state officials of the prisoner's conduct and his potential for early release, it can simply refuse to release him, and, barring an excessive abuse of discretion in this regard, such a sensitive determination would not be subject to judicial review. Thus, the very fact that the Board *can* exercise such broad discretion in determining whether to release a prisoner on parole at the time of his minimum release date would seem to compensate for whatever evaluation time may be lost to the Board during the period of a prisoner's county jail incarceration.

Moreover, it would probably often be the case, as it is with regard to the two named plaintiffs herein, that, even with the allowance of good time credit for jail time, the amount of time available to the Parole Board for observation and evaluation of a particular prisoner while in state prison would be only minimally reduced. From the prisoner's point of view, on the other hand, even such a minimal reduction in his time served would surely be of great consequence to him. In plaintiff Rutherford's case, for example, if he were to receive good time credit for the time he spent in county jail prior to sentence, he would spend five years, 11 months and 28 days in state prison (plus eight months and 2 days in county jail) before be-

coming eligible to meet the Parole Board, whereas under the state's present computation he will have to spend six years, two months and 19 days in state prison (plus the eight months and two days in county jail) before he can meet the Parole Board. While the additional two and one-half months in state prison would probably add precious little to the sum of the Parol Board's knowledge of plaintiff after nearly six years of observation and evaluation, the possibility of gaining his freedom some 81 days earlier would undoubtedly be a matter of great moment to plaintiff Rutherford and other imprisoned men like him.

Finally, defendants contend that plaintiffs are not really challenging the good time provisions of Section 230, but rather are attacking the consequences of the bail system. Defendants argue that, while there is an obvious difference in treatment between those free on bail and those in custody for failure to make bail, such a classification of "jail versus bail" is a constitutionally permissible one expressly provided for by the Eighth Amendment, and the consequences of such a classification cannot be deemed to constitute invidious discrimination. I do not disagree with this proposition; however, I have serious doubts as to whether it meets the issue at hand. Defendants rely heavily on *Rigney* v. *Hendrick*, 355 F.2d 710 (3d Cir. 1965), cert. denied 384 U.S. 975, where a defendant who was unable to post bail was, while in jail, placed in a line-up that subsequently led to his identification by a victim of another crime. In rejecting his claim of a denial of equal protection, the Third Circuit stated, at 715:

> "Here we cannot find an invidious discrimination for the different methods employed by the police in securing the identification of a suspected criminal are made necessary because of the difference in circumstances in which those free on bail and those detained find

themselves. Admittedly, there is a classification between those who can and those who cannot make bail. The Constitution, however, permits such a classification and any differences here arise solely because of *the inherent characteristics of confinement* and cannot constitute invidious discrimination." (Emphasis added.)

The real question, then, is whether or not the denial of good time credit for jail time is an "inherent characteristic of confinement." While it follows naturally that certain rights, such as "the right of privacy, to earn a livelihood, to vote, to speak freely, to associate with persons of one's choosing," *Morris* v. *Crumlish*, 239 F.Supp. 498, 500 (E.D.Pa. 1965), must be denied to unbailed defendants as a necessary consequence of their confinement, I do not believe that it follows that denial of good time credit is in any way an "inherent characteristic of confinement." Rather, the grant or denial of good time would seem to be a wholly independent creature of statute. Surely the purpose of the Eighth Amendment—to insure, by bail or, for want of that, by pre-trial incarceration, the defendant's appearance in court—would be equally well served whether or not good time credit were subsequently granted for jail time. Thus, it would appear that "while such distinctions *are necessitated by confinement* while awaiting trial may be made between those who supply bail and those who cannot," *Rigney* v. *Hendrick*, supra, 355 F.2d at 716-717 (dissenting opinion, Freedman, J.) (emphasis added), the unequal denial of good time credit for jail time required by Section 230(3) is not inherently related to such confinement and may well constitute an invidious discrimination.

In any event, as Judge Friendly recently noted, "[t]he issue here is not whether [the state statute] is unconstitutional but whether plaintiffs' claim of unconstitutionality

[is] unsubstantial 'either because it is obviously without merit or because its unsoundness so clearly results from the previous decisions of this court [the Supreme Court] as to foreclose the subject.' " *Latham* v. *Tynan*, —— F.2d —— (2d Cir., decided December 16, 1970, Docket No. 34668, at 850) (dissenting opinion). Plaintiffs' claim herein meets this test of substantiality.

Accordingly, plaintiffs' application for the convening of a three-judge court is granted.

It is so ordered.

Dated: New York, New York, January 21, 1971.

MORRIS E. LASKER,
U.S.D.J.

FOOTNOTES

[1] We are here dealing with an "indeterminate sentence," that is, a "sentence to imprisonment in a state prison having minimum and maximum limits fixed by the court." Correction Law, § 230(1).

[2] Under § 230(4) the statutory release date is set at the rate of five days off per month (as opposed to 10 days in the case of the minimum release date), or one-sixth of the maximum expiration date (that is, the maximum date of a sentence to which an inmate can be held if he receives no good time credit whatsoever, either for the time served in jail or prison).

It should be noted that the statutory scheme of § 230, which is the subject of this lawsuit, is no longer the law in New York. On September 1, 1967, § 230 was replaced by §§ 803 and 805 of the Correction Law and §§ 70.30 and 70.40 of the new Penal Law, which sections apply to all convictions for offenses committed *on or after that date* (but not to convictions—as of plaintiffs herein—for offenses committed *prior* to the effective date). Significantly, under the new statutory scheme, good time earned on the minimum sentence is abolished altogether, thus removing any question of unequal treatment. An inmate meets with the Parole Board at the expiration of his minimum term regardless of how much good time credit he has earned against his maximum sentence or of how much time he spent in county jail prior to his

receipt in state prison. Correction Law, § 805(3); Penal Law, § 70.40(1)(a). Thus, good time is now credited solely against the maximum term of an indeterminate sentence, and it is awarded without regard to whether a prisoner has served time in county jail prior to sentencing. Correction Law, §§ 803(1), 805(1); Penal Law, §§ 70.30(4), 70.40(1)(b). This calculation is identical to that made formerly pursuant to § 230(4), except that a prisoner may now earn 10 rather than 5 days good time credit per month against his maximum sentence. This computation results in the Department of Correction setting, upon a prisoner's arrival at state prison, a "conditional release date" of one-third off the maximum sentence. As in the case of the statutory release date under § 230(4), a prisoner must automatically be released (if he has not in the interim incurred any penalties which have reduced his good time allowance) upon reaching his conditional release date. In addition, any person covered by § 230(4) of the old Correction Law by reason of having commited the offense for which he was convicted prior to September 1, 1967 is entitled, at any time, to elect to serve his sentence under the provisions of the new Penal Law and the new chapters of the Correction Law, and so be eligible for "conditional release." Correction Law, § 230-a. Neither of the named plaintiffs has as yet made this election, presumably because it would foreclose them from receiving any good time credit whatsoever (either for prison time alone, or, as they now request, for both prison and jail time together) off of their minimum sentences and thus compel them to await the full expiration of their minimum terms before appearing before the Parole Board.

Thus, the scope of this case (and of any proposed class) is necessarily limited, for the challenged statute, § 230(3) of the Correction Law, now applies only to those prisoners who were convicted for offenses committed before Sepember 1, 1967, whose minimum terms have not yet expired, who have not yet met the Parole Board, and who have not as yet elected the conditional release program under § 230-a. Nevertheless, the very existence of the issue in this case attests to the continuing presence and effect of § 230(3).

[3] Such penitentiaries are county correctional institutions maintained, in general, for the confinement of persons convicted of non-felony offenses carrying sentences of one year or less.

[4] In *Phipps*, the three-judge court eventually dismissed the case as moot because by that time the plaintiff had already appeared before the Parole Board for consideration for minimum release. *Phipps* v. *McGinnis*, 69 Civ. 3236 (S.D.N.Y. May 13, 1970). The court, therefore, did not reach the merits of the case.

Appendix F, Affidavit of Deputy Commissioner John R. Cain.

STATE OF NEW YORK }
COUNTY OF ALBANY } ss.:

JOHN R. CAIN, being duly sworn, deposes and says:

I am a Deputy Commissioner in the Department of Correction and make this affidavit in connection with the computation of time in the case of Percy Rutherford, Ossining Correctional Facility #138399.

Section 230 of the New York Correction Law provides that a state prisoner may receive "for good conduct and efficient and willing performance of duties assigned", a reduction in sentence. This credit is generally referred to as "good time".

The statute provides that with respect to inmates of facilities serving an indeterminate sentence the reduction in time "shall be computed upon the minimum term of such sentence, less jail time allowance". In accordance with this statute the computation of an inmate's "good time" is made beginning with his receipt in the facility. According to the records of the Department of Correction of the State of New York, the computation of Mr. Rutherford's sentence is as follows:

Appendix F, Affidavit of Deputy Commissioner John R. Cain.

Re: Percy Rutherford
SS-138399

Robbery 1st 10—0—0/20—0—0
Grand Larceny 2nd— 2—6—0/5 —0—0 concurrent

10— 0— 0 Minimum Term
8— 2 Jail Time

9— 3—28 Minimum less jail time
3— 1— 9 compensation earned

6— 2—19 Term less compensation
66—11— 4 Date Received

73— 1—22 Minimum date

20— 0— 0 Maximum Term
8— 2 Jail Time

19— 3—28 Balance
66—11— 4 Date Received

86— 3— 1 Maximum Expiration date
6— 8— 0 Time Earned

79— 7— 1 Conditional Release Date

86— 3— 1 Maximum Expiration date
3— 4— 0 Time Earned

82—11— 1 Statutory Release Date

Appendix F, Affidavit of Deputy Commissioner John R. Cain.

The actual allowance of "good time" is discretionary and is awarded as an incentive for good conduct. It is a means for encouraging participation in programs, efficient work and discipline.

The state correctional system seeks to encourage rehabilitation by work participation by inmates, job training programs and education programs. An inmate can be evaluated in his work and participation in the facility's programs and "good time" granted as an incentive. Prior to being received in the facility, however, an inmate who is in jail is not under the supervision of the State Correction Department and is not involved in the facility program. Since the inmate is not participating in the state programs while in jail there is no opportunity to evaluate him nor need to encourage his participation.

Our facilities are part of the state correction facilities and serve a three-fold capacity with respect to convicted prisoners: They provide the means of imposing the punishment or sentence imposed by the Court; they serve to protect society by segregating and restraining the individual; and they attempt to rehabilitate the inmate. Jails on the other hand serve to provide only the purpose of restricting a prisoner prior to his conviction.

For the reasons mentioned above, the deduction of jail time in determining "good time" is reasonable and logical:

1. Jail and correctional facilities and purposes are different.
2. "Good time" is awarded as an incentive to inmates participating in the State Correction system and under its supervision.

In the computation of the term of Mr. Rutherford, his maximum release date is shown as is his statutory release

Appendix F, Affidavit of Deputy Commissioner John R. Cain.

date and his conditional release date. To the present time, Mr. Rutherford has not requested consideration for conditional release.

WHEREFORE, it is respectfully requested that the complaint herein be dismissed.

(Sworn to by John R. Cain, October 23, 1970.)

STATE OF NEW YORK }
COUNTY OF ALBANY } ss.:

JOHN R. CAIN, being duly sworn, deposes and says:

I am a Deputy Commissioner in the Department of Correction and make this affidavit in connection with the computation of time in the case of James Royster, Auburn Correction Facility #59875.

Section 230 of the New York Correction Law provides that a state prisoner may receive "for good conduct and efficient and willing performance of duties assigned", a reduction in sentence. This credit is generally referred to as "good time".

The statute provides that with respect to inmates of facilities serving an indeterminate sentence the reduction in time "shall be computed upon the minimum term of such sentence, less jail time allowance". In accordance with this statute the computation of an inmate's "good time" is made beginning with his receipt in the facility. According to the records of the Department of Correction of the State of New York, the computation of Mr. Royster's sentence is as follows:

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Appendix F, Affidavit of Deputy Commissioner John R. Cain.

RE: James Royster, #59875
DCI-971581-X

The calculation of the subject's sentences is as follows:

BURGLARY 3RD

	Minimum	*Maximum*
Sentence	5— 0— 0	10— 0— 0
Jail Time	1— 1— 9	1— 1— 9
Term less jail time	3—10—21	8—10—21
Possible good time	1— 3—17	
Term less good time	2— 7— 4	

GRAND LARCENY 1ST

Sentence	5— 0— 0	10— 0— 0
Jail Time	1— 1— 9	1— 1— 9
Term less jail time	3—10—21	8—10—21
Possible good time	1— 3—17	
Term less good time	2— 7— 4	

COMBINED CONSECUTIVE SENTENCES

Burglary 3rd	2— 7— 4	8—10—21	
Grand Larceny 1st	2— 7— 4	8—10—21	
Combined term	5— 2— 8	17— 9—12	
Received in prison	1966— 5—26	1966— 5—26	
Minimum parole date	1971— 8— 3	1984— 3— 7	Maximum expiratio
		6— 8— 0	
		1977— 7— 7	Conditional Relea
		1984— 3— 7	Maximum expiratio
		3— 4— 0	
		1980—11— 7	Statutory Relea

Appendix F, Affidavit of Deputy Commissioner John R. Cain.

The actual allowance of "good time" is discretionary and is awarded as an incentive for good conduct. It is a means for encouraging participation in programs, efficient work and discipline.

The state correctional system seeks to encourage rehabilitation by work participation by inmates, job training programs and education programs. An inmate can be evaluated in his work and participation in the facility's programs and "good time" granted as an incentive. Prior to being received in the facility, however, an inmate who is in jail is not under the supervision of the State Correction Department and is not involved in the facility program. Since the inmate is not participating in the state programs while in jail there is no opportunity to evaluate him nor need to encourage his participation.

Our facilities are part of the state correction facilities and serve a three-fold capacity with respect to convicted prisoners: They provide the means of imposing the punishment or sentence imposed by the Court; they serve to protect society by segregating and restraining the individual; and they attempt to rehabilitate the inmate. Jails on the other hand serve to provide only the purpose of restricting a prisoner prior to his conviction.

For the reasons mentioned above, the deduction of jail time in determining "good time" is reasonable and logical:

1. Jail and correctional facilities and purposes are different.

2. "Good time" is awarded as an incentive to inmates participating in the State Correction system and under its supervision.

In the computation of the term of Mr. Royster, his maximum release date is shown as is his statutory release

date and his conditional release date. To the present time, Mr. Royster has not requested consideration for conditional release.

WHEREFORE, it is respectfully requested that the complaint herein be dismissed.

(Sworn to by John R. Cain, October 23, 1970.)

Appendix G, New York Correction Law § 230.

New York Correction Law § 230:

"§ 230. Definite sentence; indeterminate sentence; discretionary reduction of sentence. 1. A sentence to imprisonment in a state prison for a definite fixed period of time is a definite sentence. A sentence to imprisonment in a state prison having minimum and maximum limits fixed by the court or the governor is an indeterminate sentence.

2. Every prisoner confined in a state prison or penitentiary, except a prisoner sentenced for an indeterminate term having a minimum of one day and a maximum of his natural life, may receive, for good conduct and efficient and willing performance of duties assigned, a reduction of his sentence not to exceed ten days for each month of the minimum term in the case of an indeterminate sentence, or of the term as imposed by the court in the case of a definite sentence. The maximum reduction allowable under this provision shall be four months per year, but nothing herein contained shall be construed to confer any right whatsoever upon any prisoner to demand or require the whole or any part of such reduction.

3. In the case of a definite sentence prisoner, said reduction shall be computed upon the term of the sentence as imposed by the court, less jail time allowance, and in the case of an indeterminate sentence prisoner, said reduction shall be computed upon the minimum term of such sentence, less jail time allowance. No prisoner, however, shall be released under the provisions hereof from a state prison until he shall have served at least one year. In the case of a prisoner confined in a penitentiary, said reduction shall be computed upon the term of the sentence as imposed by

the court, including jail time allowance. Subject to the rules of the commissioner of correction, the maximum reduction of ten days in each month may, in the discretion of the board hereinafter provided for, be in whole or in part withheld, forfeited or cancelled, in accordance with the rules of the commissioner of correction for bad conduct, violation of prison rules or failure to perform properly duties assigned.

4. Every prisoner confined in an institution under the jurisdiction of the state department of correction for an indeterminate term, except a prisoner sentenced for a term having a maximum of natural life, may receive, for good conduct and efficient and willing performance of duties assigned a reduction of his sentence not to exceed two days for each month of the maximum term. For meritorious progress and achievement in a treatment program to which he has been assigned, following appropriate testing and classification such prisoner may also receive a reduction of his sentence not to exceed three additional days for each month of the maximum term. In no event, however, shall the maximum reduction allowable under this subdivision exceed two months for each year of the maximum sentence, nor shall any such reduction be calculated under this subdivision to reduce the time actually served to a term less than the minimum sentence imposed by the court. The reduction of sentence provided for in this subdivision, or any part thereof, may be granted, withheld, forfeited or restored subject to rules and regulations which the commissioner of correction is hereby authorized to promulgate and enforce, and such rules and regulations may include special provisions for the allowance of such reduction in the case of a prisoner who is an

invalid or physically or mentally disabled who requests to be enrolled in a treatment program and performs to the limit of his capacity. But all reduction of sentence provided for in this subdivision which is received by a prisoner prior to any release on parole, including release pursuant to this subdivision, shall be forfeited and shall not be restored if the paroled prisoner is returned to an institution under the jurisdiction of the department either for violation of parole or by reason of a conviction for a crime committed while on parole. A paroled prisoner who is so returned may earn a reduction pursuant to this subdivision after his return, calculated only on the remaining portion of the maximum term of the sentence. Nothing contained herein shall be construed to confer upon any prisoner the right to demand or require any reduction of maximum sentence. Every prisoner who is released prior to the expiration of his maximum sentence pursuant to this subdivision shall remain under the supervision of the board of parole for the full term of the maximum sentence imposed by the court and the procedure and terms and conditions applicable to such release shall be the same as those provided in this article for the release and parole of a prisoner who is not otherwise subject to the jurisdiction of the parole board.

5. Nothing contained in this section shall be construed to confer upon any prisoner the right to demand or require the restoration of any reduction of sentence heretofore forfeited or withheld by the commissioner of correction. A monthly account showing any reduction of sentence that has been credited to each prisoner pursuant to this section shall be kept by the warden in suitable books or records.

Appendix G, New York Correction Law § 230.

Section 230 is implemented by Sections 234, 235 and 23
of the New York Correction Law, which state as follows:

"§ 234. Rules for allowance of reduction of sen-
tence.— The commissioner of correction shall form-
ulate rules governing the allowance or disallowance
of reductions to prisoners for good conduct and for
efficient and willing performance of duties assigned
to them in prison or penitentiary. All such rules shall
in all cases be strictly adhered to in all the prisons
and penitentiaries in this state. These rules may be
changed from time to time, if necessary, in the dis-
cretion of the commissioner of correction, and he shall
immediately upon their adoption or upon any change
in the same thereafter, cause copies of the same to
be forwarded to the wardens and superintendents of
all the state correctional institutions and the wardens
or superintendents of all the penitentiaries in this
state. A copy of these rules shall be furnished to
every prisoner entitled to the benefits of this article.

§ 235. Determination of reduction of sentence.—
For the purpose of applying the rules mentioned in
the last section for the allowance or disallowance
under the provisions of this article of reduction for
the good conduct of any prisoner, and for efficient
and willing performance of duties assigned, a board
shall be constituted in each of the prisons of this
state, to consist of the warden, the principal keeper
the physician and the officer in charge of industries
therein and, in each of the penitentiaries of this state
the warden or superintendent, the deputy or principal
keeper and the physician therein, or of the persons
acting in their place and stead. This board shall
meet once in each month before the date fixed for the
transmission of their report to the commissioner of

correction, as hereinbefore provided, and proceed to determine the amount of reduction of sentence which they shall allow to any prisoner, which shall not in any case exceed the amount fixed by this article. They shall have full discretion to withhold the allowance of reduction of sentence for good conduct and for efficient and willing performance of duties assigned, or of a part therefor, as a punishment for offenses against the discipline of the prison or penitentiary, in accordance with the rules hereinbefore mentioned. Reduction credited to a prisoner in the first instance, in his account, by the warden, as provided in section two hundred and thirty, shall stand as the reduction allowed, unless withheld wholly or partly by the board as punishment as above provided.

§ 236. Report when allowance withheld. —In all cases, however, where the board shall withhold the allowance of the whole or any part of reduction of sentence for good conduct and for efficient and willing performance of duties assigned, they shall forward with their report to the commissioner of correction their reasons in writing, for such disallowance. The action of the board in granting all withholding reductions shall be deemed a judicial function and shall not be reviewable if done according to law."

(50513)

IN THE

Supreme Court of the United States

October Term, 1971

Supreme Court, U.S.
FILED
MAR 1
E. ROBERT SEAVER

No. 71-718

PAUL D. MCGINNIS, Commissioner of Corrections, State of New York; HARRY FRITZ, Warden, Auburn Prison, Auburn, New York; J. L. CASSCLES, Warden, Ossining Correctional Facility, Ossining, New York,

Defendants-Appellants,

against

JAMES ROYSTER, PERCY RUTHERFORD and all other persons similarly situated,

Plaintiffs-Appellees.

On Appeal from the United States District Court for the Southern District of New York

MOTION TO DISMISS OR AFFIRM

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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-718

PAUL D. MCGINNIS, Commissioner of Corrections, State of New York; HARRY FRITZ, Warden, Auburn Prison, Auburn, New York; J. L. CASSCLES, Warden, Ossining Correctional Facility, Ossining, New York,

Defendants-Appellants,

against

JAMES ROYSTER, PERCY RUTHERFORD and all other persons similarly situated,

Plaintiffs-Appellees.

On Appeal from the United States District Court for the Southern District of New York

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the United States Supreme Court Rules, appellees move the Court to dismiss the appeal from a judgment and order of the United States District Court for the Southern District of New York on the ground that the questions on which the decision of the court depends do not present a substantial federal question.

In the alternative, appellees move the Court to affirm the aforementioned judgment and order on the ground that the questions on which the decision of the cause depends are quite limited in scope and have been thoroughly considered by the three-judge court, thereby requiring no further argument.

Statement

The facts comprising the basis of this appeal are correctly presented in the Attorney General's Jurisdictional Statement under the heading "Statement of the Case." The opinion convening a three-judge court and the opinion of the three-judge court are correctly set forth in Appendices "B", "D" and "E" to the Jurisdictional Statement of the Attorney General's brief.

I

The United States District Court for the Southern District of New York correctly held that Section 230(3) of the Correction Law is unconstitutional as it violates the Equal Protection Clause.

Section 230(3) of the New York Correction Law draws a distinction between the treatment of state prisoners incarcerated prior to sentencing and those who were not similarly incarcerated. Specifically the distinction is accomplished by that section's provision denying state prisoners good time credit for the period of their pre-sentence incarceration in a county jail.* This distinction is recognized

* If plaintiff Rutherford and plaintiff Royster were to receive good time credit for time spent in county jail between arrest and sentence, they will be entitled to appear before the Parole Board several months (over four months, in Royster's case; nearly three months in Rutherford's) earlier than they will under the computation required by §230(3).

in both the opinion of the three-judge court [Jurisdictional Statement, Appendix D, p. 10a] and the opinion convening the three-judge court and is readily conceded by the appellants. [Jurisdictional Statement, p. 7].

"Such a difference in treatment between persons sentenced to State prison for like terms of imprisonment smacks of discrimination on its face" [Jurisdictional Statement, Appendix D, p. 10a]. Section 230(3) quite obviously discriminates among individuals; consequently the only issue before the three-judge court was whether a rational basis existed for this distinction and whether the practice envisioned by the statute served a valid governmental objective. *Dandridge* v. *Williams*, 397 U.S. 471, 486 (1969).

The appellants did not challenge the existence of the aforementioned distinction, rather they submitted several justifications for it; the principal justification appearing in the Jurisdictional Statement. The suggested justification is two-pronged. Firstly, it is argued that State prisons differ from county jails with respect to "purpose, usage and availability of facilities" [Jurisdictional Statement, pp. 7-8]. That as it is desirable for uniform standards of evaluation and for suitable programs of activity to be followed for evaluation, only prisoners in state prisons, over which the state has jurisdiction, may be credited with good time. Secondly, the appellants argue that as the state authorities must make the admittingly sensitive decision as to when a prisoner should be released into society, that "the granting of good time leading to an earlier minimum release date should be based solely on the personal evaluation of a prisoner's conduct by state officials

while he is actually confined in their custody." [Jurisdictional Statement, pp. 10-11].

Appellants further contend that the three-judge court, in failing to accept its proffered justifications has completely ignored the equal protection standards set forth by this Court and instead has blatantly substituted its judgment for that of the New York Legislature [Jurisdictional Statement, pp. 7-12].

Appellees submit that this proposition is unsound and that it does not find support in the opinion of the three-judge court.

The District Court, correctly delineated its responsibility in this case by providing:

> " 'It is true that the Equal Protection Clause requires only that the State's action be rationally based and free from invidious discriminations.' *Dandridge* v. *Williams*, 397, U.S. 471, 487 (1969). Indeed even though a state's practice may be discriminatory and substantially harm those who are the subject of the discrimination, the practice may still be constitutionally permissible if it serves a valid governmental objective. Thus, for example, although the requirement of bail pending trial substantially discriminates against the indigent defendant, such a classification of 'jail versus bail' is constitutionally sanctioned by the Eighth Amendment as a reasonable means for insuring a defendant's appearance in court. See, e.g., *Morris* v. *Crumlish*, 239 F. Supp. 498 (E.D. Pa. 1965). Nevertheless, while laws may create such distinctions and classifications, they must be related to the purposes of the law itself, and artificial distinctions not so reasonably related will not be countenanced" [Jurisdictional Statement, Appendix D, pp. 10a-11a].

Having laid the groundwork for their determination, the three-judge court then conducted a careful examination of plaintiffs' suggested justifications. Such examination is necessitated by the procedure employed by other courts considering similar cases raising questions of equal protection. *Dandridge* v. *Williams, supra,* 397 U.S. at 482-487; *McGowan* v. *Maryland,* 366 U.S. 420 [1961]; *Briggs* v. *Kerrigan,* 431 F. 2d 967 [1st Cir. 1970]; *Boddie* v. *Wyman,* 434 F. 2d 1207 [2nd Cir. 1970]. As this Court stated in *Cohen* v. *Hurley* [366 U.S. 117 (1961), rehearing denied, 374, U.S. 857, rehearing denied, 379 U.S. 870:

> "Whatever procedures are fair, what state process is constitutionally due, what distinctions are consistent with equal protection all depend on the particular situation presented * * *."

After considering at length the facts before it, the three-judge court rejected the appellants' arguments as being unsubstantiated by the evidence [Jurisdictional Statement, Appendix D, pp. 11a-14a].

Initially, the suggested differences in purpose, usage and availability of facilities between state prisons and county jails* do not bear a reasonable relationship to the provisions of Section 230(3) and most assuredly do not

* In reference to the difference in "purpose, usage and availability of facilities" of these institutions, it is valuable to compare Section 230(3) with Section 250. Both sections provide for discretionary reduction of sentence for "efficient willing performance of the duties assigned him", even though the former section refers to state prisons while the latter refers to county jails. Also, see, Correction Law, §§246, 247, which direct that good time must be credited to the period of time a prisoner spends in any state institutions for mental defectives. In this situation, the superintendent or chief officer of the institution performs the acts normally vested in the Parole Board. It is apparent that the purpose and usage of a mental institution differ substantially from those of a state prison.

account for any permissible distinction between state prisoners serving identical terms of imprisonment merely because a prisoner underwent presentence incarceration. Instead, as the three-judge court determined, the "overriding consideration in the granting of good time reductions is the maintenance of prison discipline" [Jurisdictional Statement, Appendix D, p. 11a]. The same conclusion was reached by a New York State Court, even though upholding the constitutionality of Section 230(3) it found:

> "The policy underlying the discretionary grant of good time reductions is clear. The attitude and conduct of prisoners should improve if they are offered an incentive for good and productive behavior while at the same time the fact that reductions can be withheld will inhibit bad conduct."

Perez v. *Follette*, 58 Misc. 2d 319, 321 (Sup. Ct., Dutchess County, 1968); aff'd 31 A.D. 2d 600; motion for leave to appeal dismissed as moot, 23 N.Y. 2d 737, 296 N.Y.S. 2d 569 (1968). See, also, *Carothers* v. *Follette*, 314 F. Supp. 1014 (S.D.N.Y. 1970); *Colin* v. *New York State Parole Board*, 13 A.D. 2d 555 (1961).

That good time is awarded for good conduct is demonstrated in other ways as well. As recognized by the three-judge court, a prisoner's maximum allowance for future good time is immediately credited at the time his minimum parole date is initially computed upon his arrival in State prison (see, Jurisdictional Statement, Appendix F, pp. 35a, 38a). "In effect, then, a prisoner does not 'earn' good time credit as time goes on for exemplary performance in assorted prison programs but rather simply avoids being penalized for bad behavior" [Jurisdictional State-

ment, Appendix D, p. 12a]. See, also, *Bitz* v. *Canavan*, 11 N.Y.S. 2d 991 [1939]; rev'd on other grounds 257 App. Div. 247; aff'd 281 N.Y. 699, 23 N.E. 2d 536. The State Legislature has itself declared that the prison "board", as described in Section 235,* shall have the discretion of withholding the good time allowance as:

> "a punishment for offenses against the discipline of the prison or penitentiary, in accordance with the rules hereinbefore mentioned. Reduction credited to a prisoner in the first instance, in his account, by the warden, as provided in section two hundred and thirty, shall stand as the reduction allowed, unless withheld wholly or partly by the board as punishment, as above provided." New York Correction Law, §235.

It must also be noted that the New York Legislature empowered the State to grant good time credit for presentence jail time in the case of prisoners sentenced to a county jail or a jail farm [Correction Law, §250] and in the case of the indeterminate sentence prisoner's statutory release date from state prison. [Correction Law, §230(4)]. See, also, *Royster* v. *McGinnis*, —— F. Supp. —— (S.D. N.Y., January 21, 1971). The applicability of these sections manifests the intention of the New York Legislature to provide for a uniform scheme of reduction for all classes of prisoners. Leg. Doc. 1935, 60 (I), p. 18; see, also, pp. 25-27, 51.

Lastly, the legislative intent was readily apparent with the repeal of Section 230(3) [repealed L. 1970, c. 476, §45,

* Section 235 was repealed as of the 60th day after May 8, 1970, but it continues to apply to prisoners sentenced on an offense committed prior to September 1, 1967, the effective date of the New Penal Law.

eff. on the 60th day after May 8, 1970] and the subsequent passage of Sections 803 and 805 of the Correction Law and Sections 70.30 and 70.40 of the Penal Law [added L. 1967, c. 680, §147, eff. September 1, 1967].* Under this new statutory scheme, good time earned on the minimum sentence is abolished, and presently all prisoners appear before the Parole Board at the expiration of their minimum term notwithstanding the amount of county jail time accumulated prior to sentencing or the amount of good time earned. Good time credit, including good time computed on the period of a prisoner's pre-sentence incarceration, is now deducted from an inmate's maximum term of imprisonment in determining his statutory release date [Defendants-Appellants' Memorandum of Law, pp. 13-14]. Because of these recent changes in the law, the discriminatory practices herein contested no longer exist with regard to prisoners sentenced on offenses committed after September 1, 1967.

Nor does the appellants' last argument, *i.e.*, that a prisoner's minimum release date must be based solely on the personal evaluation of a prisoner's conduct by the State Parole Board while he is actually confined in their custody [Jurisdictional Statement, pp. 10-11], require plenary consideration by this Court. Quite apparently the appellants' concern is that the Parole Board needs sufficient time in which to evaluate an inmate's conduct, and that any good time credit computed on the period of a prisoner's pre-sentence incarceration would jeopardize the efficient performance of the Parole Board's duties.

* The repeal of Section 230(3) limits the scope of this case as the contested law applies only to prisoners convicted of an offense committed prior to September 1, 1967, the effective date of the aforementioned enactments.

We submit that this argument is without merit as the amount of time available to the Parole Board would only be minimally reduced if good time credit were allowed for pre-sentence jail time [Jurisdictional Statement, Appendix E, p. 29a, see example therein]. Additionally, the Parole Board has the inherent power to refuse to release a prisoner if it is of the opinion that it has had insufficient time for evaluation. Correction Law §§212, 213; *Royster* v. *McGinnis, supra,* —— F. Supp. ——. [See, also, Jurisdictional Statement, Appendix D, p. 15a].

Other situations present themselves which reduce the amount of time in which the Parole Board may evaluate a prisoner's conduct, yet these apparently have not undermined the effectiveness of the Board. For instance, if a state prisoner is returned to a county jail in connection with court appearances on post-trial writs of *coram nobis* they are granted good time credit for such county jail time as well. Similarly, Sections 246, 247 and 66 of the Correction Law provide for the granting of good time credit for the period of time that a prisoner has been transferred to any reformatory, state institution for mental defectives, or work training program. Even though these examples present situations where inmates have been removed from the custody of the Parole Board, good time credit, nevertheless, continues to be granted during the prisoner's absence from State Prison.

Conclusion

For the foregoing reasons, it is respectfully submitted that the decision of the three-judge court should be affirmed or, in the alternative, that the appeal be dismissed.

Respectfully submitted,

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MATTHEW MURASKIN
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February 28, 1972

FILE COPY

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MICHAEL RODAK, JR., C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-718

PAUL D. MCGINNIS, Commissioner of Correction, State of New York, HARRY FRITZ, Warden Auburn Prison, Auburn, New York, J. L. CASSCLES, Warden, Ossining Correctional Facility, Ossining, New York,

Appellants,

against

JAMES ROYSTER, PERCY RUTHERFORD and all other persons similarly situated,

Appellees.

BRIEF FOR APPELLANTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-718

PAUL D. MCGINNIS, Commissioner of Correction, State of New York, HARRY FRITZ, Warden Auburn Prison, Auburn, New York, J. L. CASSCLES, Warden, Ossining Correctional Facility, Ossining, New York,

Appellants,

against

JAMES ROYSTER, PERCY RUTHERFORD and all other persons similarly situated,

Appellees.

BRIEF FOR APPELLANTS

Opinions Below

The opinion of the three-judge District Court is reported at 332 F. Supp. 973 and appears in the Appendix at p. 53a. The opinion of the single district judge convening the three-judge court is reported at 327 F. Supp. 1318 and appears in the Appendix at p. 24a together with the Court's decisions in *Phipps* v. *McGinnis,* which were annexed to the opinion.

Jurisdiction

Jurisdiction of this Court is invoked pursuant to Title 28, U.S.C. §§ 1253 and 2101(a). The order of the District

Court was entered on October 15, 1971 and notice of appeal was filed in that Court on November 12, 1971. Appellants' jurisdictional statement was filed on November 29, 1971. Probable jurisdiction was noted on March 20, 1972.

Questions Presented

1. Whether that portion of New York Correction Law, § 230(3) that allows credit for good behavior to be computed upon the minimum term of an indeterminate sentence less jail time allowance violates the Constitution because it treats prisoners in prisons under the jurisdiction of the State of New York different from defendants in jails awaiting trial and court disposition, such jails being under the jurisdiction of the counties of New York State.

2. Whether the instant case should have been treated as a proceeding for habeas corpus with the corollary requirement that appellees exhaust their state remedies.

Statutes Involved

Section 230 of the New York Correction Law states as follows:

> "§ 230. Definite sentence; indeterminate sentence; discretionary reduction of sentence.
>
> 1. A sentence to imprisonment in a state prison for a definite fixed period of time is a definite sentence. A sentence to imprisonment in a state prison having minimum and maximum limits fixed by the court or the governor is an indeterminate sentence.
>
> 2. Every prisoner confined in a state prison or penitentiary, except a prisoner sentenced for an indeterminate term having a minimum of one day and

a maximum of his natural life, may receive, for good conduct and efficient and willing performance of duties assigned, a reduction of his sentence not to exceed ten days for each month of the minimum term in the case of an indeterminate sentence, or of the term as imposed by the court in the case of a definite sentence. The maximum reduction allowable under this provision shall be four months per year, but nothing herein contained shall be construed to confer any right whatsoever upon any prisoner to demand or require the whole or any part of such reduction.

3. In the case of a definite sentence prisoner, said reduction shall be computed upon the term of the sentence as imposed by the court, less jail time allowance, and in the case of an indeterminate sentence prisoner, said reduction shall be computed upon the minimum term of such sentence, less jail time allowance. No prisoner, however, shall be released under the provisions hereof from a state prison until he shall have served at least one year. In the case of a prisoner confined in a penitentiary, said reduction shall be computed upon the term of the sentence as imposed by the court, including jail time allowance. Subject to the rules of the commissioner of correction, the maximum reduction of ten days in each month, may, in the discretion of the board hereinafter provided for, be in whole or in part withheld, forfeited or cancelled, in accordance with the rules of the commissioner of correction for bad conduct, violation of prison rules or failure to perform properly duties assigned.

4. Every prisoner confined in an institution under the jurisdiction of the state department of correction for an indeterminate term, except a prisoner sentenced for a term having a maximum of natural life, may receive, for good conduct and efficient and

willing performance of duties assigned a reduction of his sentence not to exceed two days for each month of the maximum term. For meritorious progress and achievement in a treatment program to which he has been assigned, following appropriate testing and classification such prisoner may also receive a reduction of his sentence not to exceed three additional days for each month of the maximum term. In no event, however, shall the maximum reduction allowable under this subdivision exceed two months for each year of the maximum sentence, nor shall any such reduction be calculated under this subdivision to reduce the time actually served to a term less than the minimum sentence imposed by the court. The reduction of sentence provided for in this subdivision, or any part thereof, may be granted, withheld, forfeited or restored subject to rules and regulations which the commissioner of correction is hereby authorized to promulgate and enforce, and such rules and regulations may include special provisions for the allowance of such reduction in the case of a prisoner who is an invalid or physically or mentally disabled who requests to be enrolled in a treatment program and performs to the limit of his capacity. But all reduction of sentence provided for in this subdivision which is received by a prisoner prior to any release on parole, including release pursuant to this subdivision, shall be forfeited and shall not be restored if the paroled prisoner is returned to an institution under the jurisdiction of the department either for violation of parole or by reason of a conviction for a crime committed while on parole. A paroled prisoner who is so returned may earn a reduction pursuant to this subdivision after his return, calculated only on the remaining portion of the maximum term of the sentence. Nothing contained herein shall be construed to confer upon any prisoner the

right to demand or require any reduction of maximum sentence. Every prisoner who is released prior to the expiration of his maximum sentence pursuant to this subdivision shall remain under the supervision of the board of parole for the full term of the maximum sentence imposed by the court and the procedure and terms and conditions applicable to such release shall be the same as those provided in this article for the release and parole of a prisoner who is not otherwise subject to the jurisdiction of the parole board.

5. Nothing contained in this section shall be construed to confer upon any prisoner the right to demand or require the restoration of any reduction of sentence heretofore forfeited or withheld by the commissioner of correction. A monthly account showing any reduction of sentence that has been credited to each prisoner pursuant to this section shall be kept by the warden in suitable books or records."

Section 230 is implemented by Sections 234, 235 and 236 of the New York Correction Law, which state as follows:

"§ 234. Rules for allowance of reduction of sentence.—The commissioner of correction shall formulate rules governing the allowance or disallowance of reductions to prisoners for good conduct and for efficient and willing performance of duties assigned to them in prison or penitentiary. All such rules shall in all cases be strictly adhered to in all the prisons and penitentiaries in this state. These rules may be changed from time to time, if necessary, in the discretion of the commissioner of correction, and he shall immediately upon their adoption or upon any changes in the same thereafter, cause copies of the same to be forwarded to the wardens and superintendents of all the state correctional institutions and the wardens or superintendents of all the penitentiaries in this state. A copy

of these rules shall be furnished to every prisoner entitled to the benefits of this article.

§ 235. Determination of reduction of sentence.—For the purpose of applying the rules mentioned in the last section for the allowance or disallowance under the provisions of this article of reduction for the good conduct of any prisoner, and for efficient and willing performance of duties assigned, a board shall be constituted in each of the prisons of this state, to consist of the warden, the principal keeper, the physician and the officer in charge of industries therein and, in each of the penitentiaries of this state, the warden or superintendent, the deputy or principal keeper and the physician therein, or of the persons acting in their place and stead. This board shall meet once in each month before the date fixed for the transmission of their report to the commissioner of correction, as hereinbefore provided, and proceed to determine the amount of reduction of sentence which they shall allow to any prisoner, which shall not in any case exceed the amount fixed by this article. They shall have full discretion to withhold the allowance of reduction of sentence for good conduct and for efficient and willing performance of duties assigned, or of a part therefor, as a punishment for offenses against the discipline of the prison or penitentiary, in accordance with the rules hereinbefore mentioned. Reduction credited to a prisoner in the first instance, in his account, by the warden, as provided in section two hundred and thirty, shall stand as the reduction allowed, unless withheld wholly or partly by the board as punishment as above provided.

§ 236. Report when allowance withheld.—In all cases, however, where the board shall withhold the allowance of the whole or any part of reduction of sentence for

good conduct and for efficient and willing performance of duties assigned, they shall forward with their report to the commissioner of correction their reasons in writing, for such disallowance. The action of the board in granting all withholding reductions shall be deemed a judicial function and shall not be reviewable if done according to law."

Section 213 of the New York Correction Law states as follows:

"§ 213. Reasons for release. Discretionary release on parole shall not be granted merely as a reward for good conduct or efficient performance of duties assigned in prison, but only if the board of parole is of opinion that there is reasonable probability that, if such prisoner is released, he will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society. If the board of parole shall so determine, such prisoner shall be allowed to go upon parole outside of prison walls and inclosure upon such terms and conditions as the board shall prescribe, but to remain while thus on parole in the legal custody of the warden of the prison from which he is paroled, until the expiration of the maximum term specified in his sentence."

Statement

A.

Appellee Percy Rutherford was convicted of Robbery in the First Degree, Grand Larceny in the Second Degree and Assault in the Second Degree, in the Supreme Court, Nassau County, after trial by jury. On November 1, 1966 he was sentenced to concurrent sentences of 10 to 20 years on the robbery count, 2½ to 5 years on the larceny count, and a suspended sentence on the assault count. When he

was arraigned for these crimes he was held in bail of $5,000, which he never offered to pay. He was received in state prison on November 4, 1966, and was credited with 8 months and 2 days (242 days) jail time on his sentence for the time spent in the Nassau County Jail awaiting trial.

Upon his arrival at state prison, Rutherford received a "minimum parole date" of January 22, 1973 (All of the computations involving Rutherford are set out in the affidvait of Deputy Commissioner John R. Cain, Appendix, p. 18a). This meant that this date was the earliest opportunity that he could meet the Parole Board to determine whether he would be released on parole. Rutherford claimed, in effect, that this date should be set about three months earlier because § 230(3) operates in an unconstitutional manner.

Appellee James Royster was convicted of Burglary in the Third Degree and Grand Larceny in the First Degree in the Supreme Court, Nassau County, after trial by jury. On May 20, 1966, he was sentenced to consecutive sentences of 5 to 10 years on each count. When he was arraigned for these crimes, he was held in bail of $7,500, which he never offered to pay. He was received in state prison on May 26, 1966, and was credited with one year, one month and 9 days (404 days) jail time on his sentence for the time spent in the Nassau County Jail awaiting trial.

Upon his arrival at state prison, Royster received a "minimum parole date" of August 7, 1971 (All of the computations involving Royster are set out in the affidavit of Deputy Commissioner John R. Cain, Appendix, p. 21a). Royster claimed, in effect, that this date should be set about four months earlier.

B.

Appellees instituted an action in the District Court under 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3) for judgment declaring unconstitutional and enjoining the enforcement of § 230(3) of the New York Correction Law relating to the

awarding of credit for good behavior in state prisons. The action attacked the awarding of credit for good behavior on the minimum term of an indeterminate sentence without giving good time credit on any pre-trial incarceration spent in a county jail awaiting trial and disposition on the charge that resulted in that sentence. Appellees alleged that this differentiation between defendants in county jails and prisoners in state prisons was invidious discrimination between those who could and those who could not post bail prior to trial.

Appellants opposed this application and submitted an affidavit by Deputy Commissioner of Correction John R. Cain stating that the reason good time is not awarded to persons in county jails is because the state must be in a position of supervising and evaluating prisoner behavior in a state program before it awards such good time (Appendix, pp. 19a, 22a). By decision dated January 21, 1971, the District Court granted plaintiffs' application for the convening of a three-judge court.

On March 3, 1971, a three-judge court was convened, and by decision filed on August 23, 1971, the court held, 2-1, that § 230(3) was unconstitutional and permanently enjoined the enforcement of said provision. The majority held that there was no rational basis for the distinction made by that section between jail and non-jail defendants in the awarding of good time. While conceding that state prisons differed in purpose, usage and availability of facilities from county jails, the majority held that good time was granted primarily as an incentive for good behavior, that good time should be awarded to inmates in county jails in order to best fulfill the State's goal of inducing good conduct, and that the State could adequately fulfill any supervisory needs in awarding this good time through other methods. The dissent stated that it was not wholly arbitrary for the State to allow the Parole Board to have the power to act upon a prisoner's application for parole only

after he had spent a fixed proportion of his sentence in a place where his conduct had been under the observation of state prison officials.

The mandate of the District Court was stayed pending final determination by this Court.

The Statutory Plan

Section 230 of the Correction Law is part of a statutory plan of allowing prisoners to earn "good time" on their sentences while in state prison. Credit for jail time served while awaiting trial and disposition is credited to every prisoner who has been in the county jails. New York Penal Law, § 2193. This case concerns only the extra "good time" allowance which is given by statute only for the period that the prisoner is in state prison. Even in cases where time spent in jail before disposition was not credited to a prisoner's sentence, the courts have held that this result "is not sufficiently invidious to reach constitutional proportions". *Valcarcel* v. *United States,* 409 F. 2d 211, 213 (2d Cir. 1969); *Sobell* v. *Attorney General,* 400 F. 2d 986, 990 (3rd Cir. 1968), *cert. den.* 393 U.S. 940.

The system operated by having the Department of Correction calculate a series of release dates, which are given to each prisoner at the time he arrives at state prison. These dates are as follows:

1. "Minimum parole date"—a date calculated upon the greatest amount of good time that can be earned against the *minimum* sentence of an indeterminate term under § 230(2) and 230(3) which is the earliest date on which an inmate can be paroled at the discretion of the Parole Board.

2. "Statutory release date"—a date calculated upon the greatest amount of good time that can be earned against the *maximum* sentence of an indeterminate

term under § 230(4) which is the earliest date on which an inmate must be paroled by the Parole Board.

3. "Maximum expiration date"—the date of the maximum of a sentence to which an inmate can be held if he receives no good time credit at all.

The date at issue in this action is the "minimum parole date". A prisoner may receive a reduction of his sentence not to exceed 10 days for each month of his minimum term (§ 230[2]). In reality, however, an inmate does not "earn" this time as each month passes; instead, the greatest possible amount of his good time credit, calculated at one-third of the minimum sentence, is deducted from his sentence immediately upon arrival in prison, and the only changes in this allowance occur when penalties are inflicted (See § 235). [Thus, a prisoner with a minimum sentence of 3 years would be given a minimum parole date of 2 years, which theoretically could not be "earned" at the rate of 10 days a month or 4 months a year].

The problem in this case is that § 230(3) directs that this minimum parole date be calculated "less jail time allowance". The Department calculates the date at one-third off the time derived by first subtracting from the minimum sentence the amount of time spent in jail prior to coming to prison. [See computation for appellees, Appendix, pp. 18a, 21a] (Had appellees not spent time in jail prior to trial, their good time would be calculated at one-third off the minimum itself, which would result in a slightly greater amount of good time being subtracted). When this minimum date arrives, the Department of Parole then decides in its discretion whether the inmate should be paroled. No provision for any "good time" allowance for the period prior to confinement in state prison is authorized because by its very nature good time only applies to confinement after conviction.

Good time is awarded (or, in actuality, penalized) solely by the Department of Correction, which is the State agency responsible for the operation of the state prison system. New York Correction Law, § 235. The Department of Parole has no jurisdiction over any prisoner until the Department of Correction certifies that a prisoner is eligible for parole by "awarding" good time. However, whether or not the prisoner actually will be paroled is within the discretion of the Parole Board under the criteria set forth in § 213 of the Correction Law.

On September 1, 1967, § 230 of the Correction Law was replaced by §§ 803 and 805 of the Correction Law and §§ 70.30 and 70.40 of the new Penal Law, which apply to all convictions had after that date. Under the new statutory scheme, good time earned on the minimum sentence is abolished. A prisoner meets with the Parole Board at the expiration of his minimum term regardless of how much good time he has earned or of how much time he spent in jail prior to arriving at state prison [Correction Law, § 805(3), Penal Law, § 70.40(1)(a)]. At that meeting, the Parole Board determines in its discretion whether to release the prisoner on parole. Good time is now calculated off the maximum term of the sentence, regardless of jail time [Correction Law, §§ 803(1); 805(1); Penal Law, §§ 70.30(4); 70.40(1)(b)].

Persons imprisoned prior to September 1, 1967 have an opportunity, at any time, to elect to serve their sentence under the provisions of the new Penal Law and the new chapters of the Correction Law, and so be eligible for "conditional release" [Correction Law, § 230-a]. If they do not make this election, the old § 230(3) still applies. Both plaintiffs have not elected the new law procedures.

POINT I

By substituting its judgment for that of the New York Legislature, the decision of the three-judge District Court completely ignored the equal protection standards set forth by this Court and erroneously interpreted the role of the federal courts in reviewing state enactments.

In order to satisfy the equal protection clause of the Fourteenth Amendment, "[I]t is enough that the State's action be rationally based and free from invidious discrimination" *Dandridge* v. *Williams*, 397 U.S. 471, 486 (1969).* Legislatures are presumed to have acted constitutionally, and classifications will not be invalidated merely because the legislature moves one step at a time. *Schilb* v. *Kuebel*, 404 U.S. ——, 30 L.Ed. 2d 502, 510-511 (1971). As long as the classification is made on criteria not wholly unrelated to the objective of the statute, *Reed* v. *Reed*, 404 U.S. ——, 30 L.Ed. 2d 225, 229 (1971), or without any basis in practical experience, *South Carolina* v. *Katzenbach*, 383 U.S. 301, 331 (1968), the classification must be upheld. A statutory classification will be set aside only if no grounds can be conceived to justify it. *McDonald* v. *Board of Elections*, 394 U.S. 802, 809 (1969).

The court below applied these standards to § 230(3) of the New York Correction Law. It stated that "the real question, and indeed the only question, before the court is whether a rational basis exists for the distinction made by § 230(3) between jail and non-jail defendants in the awarding of good time credit" (Appendix, p. 58a). The Court

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*The equal protection test set forth in *Dandridge* v. *Williams* was employed by the Court below (Appendix, p. 58a) and is accepted by both parties on this appeal [See Appellees' Motion to Dismiss or Affirm, pp. 4-5]. The District Court did not decide whether the discrimination was invidious for any reason other than it lacked a rational basis (Appendix, p. 69a, fn. 14).

found that there was not a rational basis (Appendix, p. 58a). It is respectfully urged that the decision below is based upon an erroneous conception of the nature of the New York correctional system and is based upon a blatant misapplication of the equal protection standards enunciated by this Court.

A. The District Court incorrectly determined the reasons for the awarding of good time under the New York Correctional System.

It is undisputed in the record below that state prisons differ from county jails with respect to purpose, usage and availability of facilities. State prisons serve as essentially permanent residences for convicted prisoners as they serve out their sentences. They are intended to have rehabilitation as a prime purpose and the facilities at these institutions are built and equipped to serve this purpose.* To these ends, state prisons create and maintain long-term educational and vocational services such as schools, factories, job-training programs and related activities. See Affidavit of Deputy Commissioner John R. Cain, Appendix, p. 19a. State prisons come directly under the supervision of state correction authorities and it is these state authorities who must evaluate the prisoner's performance and conduct before making the difficult and sensitive decision of whether to allow him to be released into society before he completes the service of his sentence.

County jails, on the other hand, have an entirely different purpose when used for the pre-trial custody of ap-

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* New York law mandates that a prison education program be maintained at state prisons and that "each prisoner shall be given a program of education which, on the basis of available data, seems most likely to further the process of socialization and rehabilitation". New York Correction Law, § 136. The Correction Law further creates a full labor program for inmates at state prisons for both the purpose of production of supplies and for the purpose of "industrial training and instruction". Correction Law, §§ 171, et seq.

pellees. They serve solely as detention facilities. Correction Law, § 500-a(2). Persons in county jails awaiting trials or other disposition are not adjudicated prisoners, but are defendants clothed with the constitutional presumption of innocence. There would thus be no right or possibility of instituting a work program or engaging in any other program of rehabilitation for pre-trial detainees. The county jails are thus neither equipped nor intended to do anything more than detain people awaiting trial and maintain no schools, run no factories and require no work from these inmates.* County jails are supervised by local officials, and state officials have no jurisdiction whatever over inmates awaiting trial in these local jails.

These differences plainly allow for different treatment within a constitutional framework. The Constitution does not require that things different in fact be treated in law as though they are the same, and legislation may impose special burdens upon defined classes in order to achieve permissible ends. *Schilb* v. *Kuebel, supra,* 30 L.Ed. 2d 502, 513; *Rinaldi* v. *Yeager,* 384 U.S. 305, 308-309 (1966); *Tigner* v. *Texas,* 310 U.S. 141, 147 (1940).

The opinion of the court below totally misconstrued the ends sought to be achieved by New York's statutory scheme in awarding "good time". The court below ruled that the legislature's "primary aim" in the granting of good time reductions is "the maintenance of prison discipline" (Ap-

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* County jails may also be used for confinement of persons convicted of petty offenses and were used prior to 1968 for confinement of misdemeanants, Correction Law, § 500-a(4). These people were segregated from pre-trial detainees, Correction Law § 500-c. Where prisoners actually served their sentences in county jails after conviction, they were allowed to earn good time "for efficient and willing performance of duties assigned". Correction Law, § 250. In New York City, which supplies the bulk of New York's prison population, pre-trial detainees are housed in local houses of detention equipped solely to detain people awaiting trial. Convicted misdemeanants and violators are housed elsewhere.

pendix, p. 62a), and not for participation in any rehabilitation or work programs. The history of the New York Legislature's efforts to deal with the complex issue of awarding good time refutes this conclusion.

Prior New York law consistently made a distinction between "commutation" for good conduct and "compensation" for work performed. As far back as 1886, the Prison Law allowed only "a commutation or diminution" for "good conduct" [L. 1886, c. 21, §§ 1, 6, 7]. In 1889, the Legislature granted the award of *monetary* "compensation" for the "pecuniary value of work performed" in addition to commutation of sentence for good behavior [L. 1889, c. 382, § 108].

This statutory scheme specifically delineating between good behavior and work performed remained in effect for the next thirty years. With the introduction at the turn of the century of the indeterminate sentence, having both a minimum and a maximum term, the good time provisions for good conduct were amended to apply solely to definite sentences [L. 1903, c. 137, § 1]. In 1909, the good time provisions were codified into § 230 of the Prison Law [L. 1909, c. 47]. However, in 1916, the Prison Law underwent another major revision. It retained the "commutation" of time to be served for good behavior on definite sentences but it eliminated monetary compensation for work performed. In place of money, "compensation" of a reduction in sentence was awarded "for efficient and willing performance of duties assigned". This new compensation consisted of up to 10 days "in any such 30 day period in which the duties assigned are performed" and was to be awarded on both definite sentences and on the minimum terms of indeterminate sentences [L. 1916, c. 358]. Therefore, New York law was now making a clear distinction between time awarded for good behavior ("commutation" awarded on a sliding scale for only definite sentences) and additional time awarded for "performance of duties assigned" ("com-

pensation" awarded at a fixed rate on both definite and indeterminate sentences). See *People ex rel. Vanilla* v. *Denno*, 7 N.Y. 2d 29, 194 N.Y.S. 2d 486, 163 N.E. 2d 317 (1959)*.

In 1931, New York decided to consolidate these two different bases for the awarding of good time so that only one subtraction for good time would be made. Section 230(4) was amended to read that any person imprisoned after July 1, 1931 now could "earn for himself by good conduct *and* by efficient and willing performance of duties assigned" (emphasis added), a "compensation or diminution" of up to 5 days each month [L. 1931, c. 348]**. The statute thus retained the distinction of prior law between good conduct and work performed, but simplified the computation of time awarded. This language appears in § 230(2) of the Correction Law as it now affects appellees in the instant case. Good time thus is clearly not solely or even "primarily" an incentive for good behavior, as stated by the court below, but also equally applies to an evaluation of an inmate's work and training performance while in prison.

Since county jails have no educational, vocational or any other types of training or work programs or even work opportunities for pre-trial detainees, there is no way of equating the good time earned "for efficient and willing performance of duties assigned" in state prison with the mere confinement in county jails. The simple fact is that there are no duties assigned to prisoners who have not

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* Section 249 of the Prison Law was added in 1916 to define "compensation" as a reduction of sentence "on account of efficient and willing performance of duties assigned". Section 243 mandated that a paroled prisoner who commits a felony on parole and is returned cannot earn "commutation" for the remainder of his term, but was allowed to earn "compensation" on such remainder.

** Thus consolidation was first made for definite sentences in 1926 [L. 1926, c. 736] and applied to the minimum term of indeterminate sentences in 1931.

been convicted*. Inmates in institutions that serve different purposes and have different facilities can be treated differently. See *Urban* v. *Settle*, 298 F. 2d 592 (8th Cir. 1962); *Bush* v. *Ciccone*, 325 F. Supp. 699 (W.D. Mo. 1971) (upholding statutory denial of good time under 18 U.S.C. § 4241 for prisoners transferred to the Federal Medical Center).

In spite of these differences, the court below attempted to point to other provisions of the Correction Law to show that good time was "primarily" a reward for good behavior. It cited section 235 to show that good time may be withheld as punishment for offenses "against the discipline" of the prison (Appendix, p. 60a). This does not have any special meaning. Clearly, failure to efficiently and willingly perform duties assigned would be offenses against the discipline of the prison. Indeed, § 230(3) specifically mandates loss of good time for "bad conduct, violation of prison rules *or failure to perform properly duties assigned*" (emphasis added).

Nor does the fact that the state grants good time for pre-sentence jail time on the *maximum* terms of an indeterminate sentence lead to the conclusion that good time is primarily a good conduct reward.** A decision to release a prisoner prior to the expiration of his minimum

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* Federal law also makes this distinction between good conduct and work performed. 18 U.S.C. § 4161 allows prisoners to earn good time if they have "faithfully observed all of the rules". 18 U.S.C. § 4162 allows additional good time for "actual employment" and "performing duties of outstanding importance". By recent federal policy, good time under § 4161 is deducted from jail time; good time under § 4162 is not so deducted. See *Cohen* v. *Ciccone*, 318 F. Supp. 831 (W.D. Mo. 1970).

** Good time on the maximum term of an indeterminate sentence was instituted in 1962 as a new § 230(4) [L. 1962, c. 826]. It awarded two days per month "for good conduct and efficient and willing performance of duties assigned" and an additional three days per month for achievement in a treatment program. The statute specifically excluded credit for "time served in confinement in

(*footnote continued on following page*)

sentence, as opposed to the maximum sentence, requires a much greater need for personal supervision and evaluation of the inmate by state officials in a full state correctional program. The decision means that the Parole Board will be allowed to release a prisoner into society in the face of a sentence by a state court judge who determined, in evaluating the prisoner's prior record and the magnitude of his crime, that this minimum sentence was the *least* amount of time the prisoner should participate in the state prison program. While the prisoner is in a county jail, the state has no means of evaluating his conduct or performance in order to make the sensitive decision of release before even the minimum of his sentence is served. Indeed, even if the state were to take over all of the county jails, there would be no way of evaluating the conduct, performance and potentiality for rehabilitation and release of an inmate in a county jail who participates in no programs whatever. It is clearly a valid governmental aim for the state to decide that individuals shall be evaluated for the same amount of time under a full work and training program before they are released into society prior to the lowest possible date set

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(*footnote continued from previous page*)

an institution other than a state prison or penitentiary". In 1966, this latter provision was eliminated and the first sentence amended to apply only to a prisoner "confined in an institution under the jurisdiction of the state department of correction". Therefore, good time on the maximum was not awarded for pre-trial incarceration in county jails. However, in 1968, a New York lower court ordered that good time on the maximum be awarded for jail time because §230(4) does not specifically exclude jail time as did §230(3). *People ex rel. Stark* v. *Deegan*, 56 Misc. 2d 567, 289 N.Y.S. 2d 285 (Sup. Ct., Westchester Co., 1968). The Department of Correction then decided in its discretion as a matter of policy that it would award such good time for jail time on the maximum sentence. The New York courts have upheld the denial of good time for jail time on the minimum sentence. *Matter of Peres* v. *Follette*, 58 Misc. 2d 319, 295 N.Y.S. 2d 231 (Sup. Ct., Dutchess Co., 1968), *aff'd* 31 A.D. 2d 600, 295 N.Y.S. 2d 608 (2d Dept.), *mot. for leave to appeal dismissed as moot*, 23 N.Y. 2d 737, 296 N.Y.S. 2d 569 (1968).

by the sentencing court. See *Pagliaro* v. *Cox*, 143 F. 2d 900, 901 (8th Cir. 1944).

However, these considerations are minimized in considering release prior to the *maximum* date of an indeterminate sentence. The prisoner has already served a term past the minimum and so has fulfilled the mandate of the evaluation of the sentencing judge. The prisoner has also participated longer in the state correctional program, and the Correction Department, in its awareness that good time credit is an effective disciplinary device, determined that its evaluation in a full prison program was less important than it would be for release prior to the minimum term.*

The striking flaw in the District Court's opinion is that even if good time was "primarily" a good behavior device, the awarding of good time would still require the evaluation and supervision of state prison personnel in a state prison. Good behavior is not an abstraction that can be applied with exact equivalence to totally different fact situations, and the state can rationally decide to accord different values to behavior in institutions that have totally different programs. Good behavior while participating in a full state work and rehabilitation program clearly requires different evaluation than good behavior while sitting idle in a jail cell.

In fact, until recently changed by federal policy, the federal prison system itself did not require the awarding of good time for pre-trial incarceration under 18 U.S.C. § 4161, which awards good time solely for good behavior. Section 4161 states that good time begins to run "with the

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* Section 230(3) allows good time credit for jail time on sentences of under one year in penitentiaries. Where the sentence is so short, and the crime proportionately less serious than that of a felony, the Legislature determined that the sensitive evaluation of the Correction Department was not that essential insofar as computing release for good time earned.

day on which the sentence commences to run", and the sentence does not start to run until the prisoner is received in a federal penitentiary. See *Blackshear* v. *United States*, 434 F. 2d 58 (5th Cir. 1970). The federal courts have uniformly upheld the denial of the opportunity to earn good time on this jail time. *Bandy* v. *Willingham*, 398 F. 2d 333 (10th Cir. 1968), *cert. den.* 393 U.S. 1006; *Aderhold* v. *Ellis*, 84 F. 2d 543 (5th Cir. 1936), *cert. den.* 299 U.S. 587; *Swope* v. *Lawton*, 83 F. 2d 814 (9th Cir. 1936).

This Court cannot discount the importance of state evaluation in a full prison program in the face of affidavits stating that this is an essential part of the good time award (Appendix, p. 19a). Indeed, the need for state supervision of its own programs has been cited in other states as the basis for the denial of good time credit for time spent outside of that supervision. *Gentry* v. *Texas*, 464 S.W. 2d 848, 850 (Ct. of Crim. Appeals of Texas, 1971); *Lipschitz* v. *New Jersey*, 43 N.J. Super. 522, 129 A. 2d 310 (App. Div. 1957); *Application of Leibowitz*, 43 N.J. Super. 579, 129 A. 2d 466 (App. Div. 1957).*

The importance of supervision in a full correctional program is highlighted by the judicial treatment of the election procedure of the former Rule 38(a)(2) of the Federal Rules of Criminal Procedure. Prior to its amendment in 1966, a defendant wishing to appeal his conviction could elect not to serve his sentence pending appeal in order to remain in the place where he was tried. However, while he was still imprisoned in the local federal facility, he re-

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* In denying good time credit for time spent in the county jail prior to trial, the New Jersey court in *Lipschitz, supra,* stated (129 A. 2d at 312-313):

> "The granting or withholding of commutation credits requires the exercise of judgment by the officials specifically designated in [the statute], based upon their observation and evaluation of the prisoner's conduct. They can only exercise such judgment when the prisoner is in their custody at the State Prison".

ceived no credit on his sentence. The federal courts have consistently upheld the denial of this jail time—even where the defendant was given the maximum sentence—because a sentence did not begin to be served until a defendant was under federal supervision in a federal prison program. *Duke* v. *Blackwell*, 429 F. 2d 531 (5th Cir. 1970); *Tandler* v. *Blackwell*, 412 F. 2d 781 (5th Cir. 1969); *Valcarcel* v. *United States*, *supra*; *Sobell* v. *Attorney General*, *supra*; *United States* v. *Pruitt*, 397 F. 2d 509 (7th Cir. 1968). There can hardly be any constitutional deprivation for the denial of good time for time spent in a local detention facility where the courts have consistently found no constitutional deprivation for the denial of the very jail time itself.

B. The District Court misapplied the equal protection standards as interpreted by prior Supreme Court decisions and substituted its own views for valid enactments of the state legislature.

The majority of the District Court did not challenge any of the differences between state prisons and county jails (Appendix, p. 59a). It did not reject the uncontested allegations of appellants as to the need for state supervision and evaluation in a state program before good time could be awarded (Affidavit of John R. Cain, Appendix, p. 19a). What the majority held was that the need for inmate participation in and state supervision of the educational, training and rehabilitative programs of a state facility was not the "primary" reason for the awarding of good time and therefore saw no rational basis in making a distinction between good behavior in state prisons and good behavior in county jails (Appendix, pp. 59a-60a, 61a-62a). This conclusion is based upon a totally erroneous equal protection standard.

Even assuming *arguendo* that the "primary" reason for the awarding of good time is to encourage good behavior

the lower court must be reversed, for the majority below has created an equal protection standard that has no basis in any of the decisions of this Court. In applying the rational basis standard, it has stated in effect that a statutory distinction will be upheld only if it is supported by what a court may consider to be the "primary reason" for the making of the distinction. This is squarely in contradiction to the uniform rulings of this Court that a distinction made by a state statute must be upheld "if *any* state of fact *can conceivably* justify it". (Emphasis added.) *Dandridge* v. *Williams, supra,* 397 U.S. at 485; *McDonald* v. *Board of Elections, supra,* 394 U.S. at 809; *McGowan* v. *Maryland,* 366 U.S. 420, 426 (1961).

It is true that an inmate who serves time in a county jail prior to conviction may meet the Parole Board a few months later than an inmate serving the same sentence who was not incarcerated prior to trial. However, the fact that a statute might disadvantage a particular class does not mean that it denies equal protection. *James* v. *Valtierra,* 402 U.S. 137, 142 (1971). This case does not deal with distinctions made as to any fundamental constitutional rights. The federal courts have uniformly held that the granting or denial of good time in state prisons does not raise any federal constitutional question or bring into issue any federally protected rights. *Hanvey* v. *Pinto,* 441 F. 2d 115 (3rd Cir. 1971); *Douglas* v. *Sigler,* 386 F. 2d 684, 686 (8th Cir. 1967); *Quirke* v. *Beto,* 373 F. 2d 739 (5th Cir. 1967); *Burns* v. *Crouse,* 339 F. 2d 883 (10th Cir. 1964); *Aderhold* v. *Ellis, supra.*

Appellants presented a clear valid reason for the distinction made in § 230(3)—that since it is the state correction authorities who must ultimately make the sensitive decision of whether to allow a prisoner to be released prior to the expiration of his minimum sentence, the granting of good time leading to an earlier minimum release should be based solely on a personal evaluation of a

prisoner's conduct by state officials in a state prison program. It is totally irrelevant whether or not this is the "primary" reason for the statute. The distinction made is clearly related to the objective of the statute of encouraging good behavior consistent with protecting society. Neither the majority nor the appellees contested this reason and the application of the rational basis standard must end at this point.

However, the District Court did not follow the explicit holdings of this Court in equal protection cases. Instead, the majority decided that the encouragement of good behavior was such a compelling reason for the awarding of good time that good behavior should also be rewarded among pre-trial detainees regardless of the differences in place of confinement (Appendix, pp. 61a-62a). The Court then set forth alternative ways of how state officials might be able to fulfill their goal of supervision while fulfilling the District Court's goal of rewarding good behavior for time spent in county jails awaiting trial (Appendix, p. 62a). In effect, the District Court ruled that the New York Legislature did not create the most effective good time program consistent with what the District Court believed were the goals of the Legislature, and therefore decided that the federal courts should mandate a program which "would serve *the greater goal* of inducing good behavior by the prisoners throughout the total period of their confinement" (Emphasis added; Appendix, p. 62a). This is a blatant imposition of the District Court's own philosophy of penology and is the very judicial activity forbidden by this Court.

This Court has consistently held that a federal court cannot strike down a state statute because it has a different view as to what would be a wiser statutory scheme. *Dandridge* v. *Williams, supra,* 397 U.S. at 485-488; *Norvell* v. *Illinois,* 373 U.S. 420, 424 (1963). As the Court most

recently stated in *Labine* v. *Vincent*, 401 U.S. 532, 537 (1971):

> "The Federal Constitution does not give this Court the power to overturn the State's choice under the guise of constitutional interpretation because the Justices of this Court believe that they can provide better rules."

The fact that the District Court believed that the encouragement of good behavior in county jails should be a state goal does not mean that it must be a state goal by constitutional mandate. There is no constitutional right to good time (See cases at p. 23, *supra*) and the difference in facilities and usage of state prisons and county jails allow for the making of valid distinctions in awarding good time. The District Court's belief that good time could be awarded in county jails "without imposing great expense or administrative burden on the state" (Appendix, p. 62a), besides being incorrect,* is totally irrelevant to any decision based on constitutional grounds. New York has decided that the awarding of good time on the minimum sentence requires state supervision in a state program, and a federal court is not free to reject this rationale because it believes it can run the state prison system in a better manner consistent with the personal penal philosophies of the respective federal judges. See

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* The ruling of the District Court is calculated to impose on the State the unprecedented burden of taking over the supervision of every local jail in the State. The problem of determining what branch of government could best administer detention facilities has recently been given deep consideration by the Advisory Commission on Intergovernmental Relations, a national commission established by Act of Congress [Public Law 380] and the Commission recommended that jails and detention facilities continue to be administered by localities, and not by the state. *State-Local Relations in the Criminal Justice System*, Advisory Commission on Intergovernmental Relations, Washington, D.C., August 1971, pp. 55-56.

Sostre v. *McGinnis*, 442 F. 2d 178, 191 (2d Cir. 1971), cert. *den.* 404 U.S. —— (1972). As this Court stated in *Lalor* v. *Vincent, supra* (401 U.S. at 538-39):

> "It may be possible that some of these choices are more 'rational' than the choices [made by the State Legislature] . . . Absent a specific constitutional guarantee, it is for that legislature not the life-tenured judges of this Court to select from among possible laws."

Indeed, much of the reasoning of the majority below attacking the rationality of § 230(3) is based upon the majority's conception that the supervisory aspect of good time is minimal because the Parole Board would still have the discretion to refuse to release any prisoner who had earned sufficient good time on his minimum sentence (Appendix, p. 63a). The court below fails to recognize that the Legislature did not intend that the Parole Board be *allowed* to exercise its discretion until after a prescribed minimum amount of state supervision and state confinement had elapsed. The majority cannot substitute its own judgment for that of a state legislature as to the criteria by which a state agency should operate.

The application of this remarkable "primary basis" standard must of necessity lead the courts to examine the motivation of state legislatures in passing statutes. This is a virtually impossible task, and such examination by the courts has been condemned by this Court. *Palmer* v. *Thompson*, 403 U.S. 217, 224-25 (1971). In the instant case, the majority below refused to consider the supervisory aspects of good time because the awarding of good time was not based "solely and exclusively" on the evaluation of a prisoner's performance in a state prison program (Appendix, p. 59a). Presumably, the New York legislature could repass the same § 230(3) for the reasons suggested by the Court, and the District Court would then

have to uphold it. The application of the equal protection standard as announced below would require the federal courts to sit as super-legislatures for the states, and would lead to the very type of prohibited judicial legislation as occurred in the instant case.

The need for state supervision in a state program thus presents a clear valid rational basis for the distinctions made in § 230(3) between awarding good time in state prison and county jails. The District Court's finding to the contrary represents an impermissible imposition of its own penal philosophy on the state. As the dissent below correctly indicates, the decision of the District Court is based solely "on the judges' convictions that they can administer state prisoners more wisely than the state authorities, and not on any compelling constitutional considerations" (Appendix, p. 70a).

POINT II

The Court below should have treated this case as a proceeding for habeas corpus and should have required the appellees to have exhausted their state remedies.

This Court has only recently reaffirmed a determination to enforce the congressional policy that persons seeking relief from the restraint of state court judgments first proceed to exhaust available state remedies before seeking relief in the federal courts, 28 U.S.C. § 2254; *Picard* v. *Connor*, 404 U.S. ——, 30 L. Ed. 2d 438 (1971); *Wilwording* v. *Swenson*, 404 U.S. ——, 30 L. Ed. 2d 418, 421 (1971). A number of lower courts have ruled that this requirement may not be evaded by disguising an application for habeas corpus as a civil rights action. See e.g. *Grayson* v. *Montgomery*, 421 F. 2d 1306 (1st Cir. 1970); *Smartt* v. *Avery*, 411 F. 2d 406 (6th Cir. 1969); *Bennett*

v. *Allen*, 396 F. 2d 788 (9th Cir. 1968); *Johnson* v. *Walker*, 317 F. 2d 418 (5th Cir. 1963); *Duncombe* v. *State of New York*, 267 F. Supp. 103 (S.D.N.Y. 1967); *Lombardi* v. *Peace*, 259 F. Supp. 222 (S.D.N.Y. 1966). We submit that this is a correct statement of the law and applies in the instant case.

The sole object of the instant action was to gain appellees' release from the custody of the State Department of Correctional Services. The fact that the Parole Board may still have had to exercise its discretion to release appellees does not change the object of the proceeding. The historic function of the habeas corpus petition is to afford relief from confinement unlawfully imposed, and there is no reason for denying their natural meaning to the words of 28 U.S.C. § 2254, that a writ of habeas corpus may be entertained by a federal court "in behalf of a person in custody pursuant to the judgment of a State court . . . on the ground that he is in custody in violation of the Constitution . . ." See *Smith* v. *Follette*, 445 F. 2d 955, 962 (2d Cir. 1971) (Concurring opinion of KAUFMAN, J.). In substance, this action was a proceeding for habeas corpus, and, despite the presence of a constitutional issue, should have been heard and determined by a single-judge district court, *Jackson* v. *Denno*, 378 U.S. 368, 370 (1964) provided the necessary pre-requisite of exhaustion of state remedies had been satisfied. 28 U.S.C. § 2254; *Picard* v. *Connor*, *supra*, *Wilwording* v. *Swenson*, *supra*. It was thus erroneous for the District Court to have held exhaustion to be unnecessary (Appendix, p. 57a).

CONCLUSION

For all the foregoing reasons, the decision below should be reversed.

Dated: New York, New York, April 26, 1972.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 197...

No. 71-718

PAUL D. McGINNIS, Commissioner of Correction, State of New York, HARRY FRITZ, Warden, Auburn Prison, Auburn, New York, J.L. CASSCLES, Warden, Ossining Correctional Facility, Ossining, New York,

Appellants,

v.

JAMES ROYSTER, PERCY RUTHERFORD and all other persons similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-718

PAUL D. McGINNIS, Commissioner of Correction, State of New York, HARRY FRITZ, Warden, Auburn Prison, Auburn, New York, J.L. CASSCLES, Warden, Ossining Correctional Facility, Ossining, New York,

Appellants,

v.

JAMES ROYSTER, PERCY RUTHERFORD and all other persons similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES

OPINIONS BELOW

The opinion of the three-judge District Court is reported at 332 F. Supp. 973 and appears in the Appendix at p. 53a. The opinion of the single District Judge convening the Three-Judge Court is reported at 327 F. Supp. 1318 and appears in the Appendix at p. 24a.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to Title 28, U.S.C. §§ 1253 and 2101(a). The order of the District Court was entered on October 15, 1971 and notice of appeal was filed in that Court on November 12, 1971. Appellant's jurisdictional statement was filed on November 29, 1971. Appellees' motion to dismiss or affirm was filed on February 28, 1972. Probable jurisdiction was noted on March 20, 1972.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This cause directly involves the constitutionality of the remission of sentence for good conduct provision of Section 230(3) of the New York Correction Law, in relation to the Equal Protection of the Laws Clause of the Fourteenth Amendment to the Constitution of the United States.

The full text of "Section 230 of the New York Correction Law" along with other relevant provisions of the Correction Law, is printed in the Brief for Appellants, pp. 2-7.

QUESTIONS PRESENTED

1. Whether that portion of Section 230(3) of the New York Correction Law which allows credit for good behavior to be computed upon the minimum term of an indeterminate term of imprisonment less pre-sentence jail time allowance violates the Equal Protection of the Laws Clause of the Fourteenth Amendment to the Constitution of the United States because it distinguishes between

state prisoners who underwent pre-sentence incarceration and those who were not so incarcerated even though both types of prisoners received like terms of imprisonment.

2. Whether the appellees have stated a cognizable claim under the Civil Rights Act over which the Three-Judge District Court had jurisdiction.

STATEMENT OF THE CASE

The statement of the case contained in the Brief for Appellants' is correct, with the exception that the Three-Judge District Court did not reach a consideration of the merits of defendants-appellants' argument that state prisons differ from County Jails with respect to "usage, purpose or availability of facilities" (Appendix, pp. 59a, 61a). Instead the Three-Judge court ruled that whatever distinctions exist between the two entities, such distinctions are not reasonably related to the purpose of Section 230(3) of the Correction Law and consequently do not present a reasonable basis for the distinctions envisioned in that Section (*Id.*).

SUMMARY OF ARGUMENT

Section 230(3) of the New York Correction Law discriminates against state prisoners who were incarcerated prior to being sentenced to an indeterminate sentence of imprisonment. This discrimination is accomplished by that section's provision directing that good behavior reductions on a prisoner's sentence not be computed upon the term of pre-sentence incarceration. The practical effect of this section is to disallow a prisoner so incarcerated prior to sentence from appearing before the Parole Board until several months after a

prisoner not so incarcerated would appear, even though in both situations the prisoners received like terms of imprisonment.

James Royster and Percy Rutherford, who were incarcerated in a County Jail prior to sentence, individually and on behalf of all persons similarly situate, submit that the computation of good time allowance provision of Section 230(3) contravenes and violates the Equal Protection of the Laws Clause of the Fourteenth Amendment to the Constitution of the United States, and respectfully pray that the decision of the Three-Judge District Court, holding the discrimination envisioned within this section unconstitutional, be affirmed for:

1. The aforementioned different treatment of individuals prosecuted pursuant to state penal and criminal procedure laws and receiving like indeterminate terms of imprisonment creates an "invidious discrimination" not rationally based or serving a valid governmental objective. *Dandridge v. Williams*, 397 U.S. 471, 487 (1969); and,

2. The Plaintiff-Appellees in this cause have presented a cognizable claim over which the Three-Judge District Court rightfully had jurisdiction. *Monroe v. Pape*, 365 U.S. 167 (1961); *Cooper v. Pate*, 378 U.S. 546 (1964); *Wright v. McMann*, 387 F.2d 519 (2d Cir. 1967).

ARGUMENT

I.

THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK CORRECTLY HELD THAT SECTION 230(3) OF THE CORRECTION LAW IS UNCONSTITUTIONAL AS IT VIOLATES THE EQUAL PROTECTION OF THE LAWS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

Section 230(3) of the New York Correction Law draws a distinction between the treatment of state prisoners incarcerated prior to sentencing and those who were not similarly incarcerated. Within the purview of this section are all persons who were charged with the commission of a felony prior to September 1, 1967, arraigned, convicted and sentenced thereon pursuant to the penal laws and criminal procedure laws of the State of New York. While any criminal prosecution brought against individuals so situated is initiated by the state and while the state provides specific procedures to be employed concerning the treatment of persons so charged both prior to and after the imposition of sentence, the State Legislature has created a distinction between persons incarcerated prior to sentence and those who were not similarly incarcerated, notwithstanding the fact that both classes of individuals received like terms of imprisonment.

This distinction is accomplished by the provision in Section 230(3) denying state prisoners good time credit for the period of their pre-sentence incarceration in a County Jail whereas those fortunate enough to obtain bail prior to sentence received a full allowance of good time credit for the entire period which they ultimately

spend in custody in a state prison. The ultimate effect of this distinction is to disallow a prisoner receiving pre-sentence incarceration from appearing before the Parole Board until several months later than a person not similarly incarcerated, even though both prisoners received identical sentences.

If Plaintiff-Appellee Rutherford and Plaintiff-Appellee Royster were to receive good time credit for time spent in County Jail between arrest and sentence, they will be entitled to appear before the Parole Board several months (over four months, in Royster's case;[1] nearly three months in Rutherford's) earlier than they will under the computation required by §230(3).

The distinction is recognized in both the opinion of the Three-Judge Court [Appendix, p. 58a] and the opinion concerning the Three-Judge Court and is readily conceded by the Appellants [Brief for Appellants, pp. 13, 23].

"Such a difference in treatment between person sentenced to state prison for like terms of imprisonment smacks of discrimination on its face" (Opinion of the Three-Judge District Court, Appendix p. 58a). Section 230(3) quite obviously discriminates among individuals; consequently the only issue before the Three-Judge Court was whether the practice envisioned by the statute served a valid governmental objective. *Dandridge v. Williams*, 397 U.S. 471, 486 (1969).

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[1] Royster appeared before the Parole Board and was paroled on August 30, 1971.

A. Good Time Reductions Upon a Prisoner's Sentence Are Not Reasonably Related to Alleged Differences in "Usuage Purpose, or Availability of Facilities" Between the State Prisons and County Jails.

The Appellants did not challenge the aforementioned distinction, rather they submitted several purported justifications for it. Initially, Appellants argue that State Prisons differ from County Jails with respect to purpose usage and availability of facilities and that because of these differences, it is constitutionally permissible to treat the two areas as different in law (Brief for Appellants, pp. 14-15). Even assuming that state prisons are different in fact from county jails, this proffered justification is not a viable one as it does not bear a reasonable relationship to the provisions of Section 230(3) and most assuredly does not account for any permissible distinctions between state prisoners serving identical terms of imprisonment merely because a prisoner underwent pre-sentence incarceration.

The Three-Judge Court recognized the need for any suggested justification to bear a reasonable relationship to the law when it stated:

"Nevertheless, while laws may create such distinctions and classifications, they must be related to the purposes of the law itself, and artificial distinctions not so reasonably related will not be countenanced" (Opinion of the Three-Judge District Court, Appendix, p. 59a). Bearing this requirement in mind the Three-Judge Court analyzed Section 230(3) and determined that the alleged difference in county jails and state prisons did not bear a reasonable relationship to the differences in treatment provided for in this Section. Instead the Court determined that the "over-riding consideration in the granting

of good time reductions is the maintenance of prison discipline" (Opinion of Three-Judge District Court, Appendix, p. 59a).

The same conclusion was reached by a New York State Court, even though upholding the constitutionality of Section 230(3) it found:

> "The policy underlying the discretionary grant of good time reductions is clear. The attitude and conduct of prisoners should improve if they are offered an incentive for good and productive behavior while at the same time the fact that reductions can be withheld will inhibit bad conduct."

Perez v. Follette, 58 Misc. 2d 319, 321 (Sup. Ct., Dutchess County, 1968); aff'd 31 A.D.2d 600; motion for leave to appeal dismissed as moot, 23 N.Y.2d 737, 296, N.Y.S.2d 569 (1968). See also, *Carothers v. Follette*, 314 F. Supp. 1014 (S.D.N.Y. 1970); *Colin v. New York State Parole Board*, 13 A.D.2d 555 (1961).

That good time is awarded for good conduct is evidenced in other ways as well. As recognized by the Three-Judge Court, a prisoner's maximum allowance for future good time is immediately and automatically computed and credited to an inmate's sentence upon his arrival in State Prison [Appendix, p. 60a]. This is most important for "In effect, then, a prisoner does not 'earn' good time credit as time goes on for exemplary performance in assorted prison programs but rather avoids being penalized for bad behavior" (Id.). See also, *Bitz v. Canavan*, 11 N.Y.S.2d 991 (1939); rev'd on other grounds 257 App. Div. 247; aff'd 281 N.Y. 699, 23 N.E.2d 536. The State Legislature has itself declared that the prison "board", as described in Section 235 of the Correction Law, shall have the discretion of withholding the good time allowances as:

"... a punishment for offenses against the discipline of the prison or penitentiary in accordance with the rules herein before mentioned. Reduction credited to a prisoner in the first instance, in his account, by the warden, as provided in Section 230, shall stand as the reduction allowed, unless withheld wholly or partly by the board as punishment, as above provided." New York Correction Law, §235.

That a reduction in good time allowance is a punitive device for disciplining a prisoner is also indicated by the procedures established by the Commissioner to determine whether such reduction shall occur. The possibility of withholding good time first occurs when an inmate engages in misbehavior involving danger to life, health, security or property or when an inmate persists in engaging in minor infractions to the prison rules after having been warned, counseled or reprimanded for these minor infractions. [7 N.Y.C.R.R. 251.4, 251.5]. When the aforementioned events occur a report must be filed with the superintendent describing the particular acts of misconduct. (*Id.*). These reports, along with reports of the inmates history and with a written explanation from the inmate concerning his actions, are then reviewed by the "adjustment committee", a committee composed of three employees designated by the superintendent, in order to ascertain a basic understanding of the matter. Once this review is completed the committee may take one of three possible courses of action; it may recommend reappraisal of the inmates program in the prison, it may recommend to the superintendent that the report be nullified, or it may retain control over the matter and take "adjustment committee action." [7 N.Y.C.R.R. 252.3, 252.4]. In the latter instance the committee may defer any action for a period up to three months if it is of

the opinion that the inmates attitude is satisfactory, or it may discipline the inmate by withdrawing any of his specified privileges in the jail, by confinement in his cell or by confining the inmate in a special housing unit [7 N.Y.C.R.R. 252.5]. Only when an inmate persists in failure or refusal to follow the instructions of this committee, or where the committee is of the opinion that a procedure involving formal findings and punitive sanctions are necessary, does the committee recommend to the superintendent that a "superintendent's proceeding" be held [7 N.Y.C.R.R. 252.6].

If the superintendent reasonably believes that an inmate's behavior has constituted a danger to life, health, security or property, or that an inmate has deliberately failed or has refused to follow the guidance and counseling of the adjustment committee, the superintendent may direct that a superintendent's proceeding be held [7 N.Y.C.R.R. 253.1(a)]. It is at this proceeding that formal charges are brought against the inmate, an employee of the prison is assigned to assist the inmate and a formal procedure is followed in determining whether to affirm or dismiss the charges [7 N.Y.C.R.R. 253.2; 253.3; 253.4]. If the charge is affirmed or if the inmate admits to the charge then the inmate may be disciplined by reprimand, loss of specified privileges, change of program, confinement with or without the same diet as other inmates, restitution for intentional damage, *loss of a specified period of good behavior allowance*, or referral to the adjustment committee for further action [7 N.Y.C.R.R. 253.5]. If the punishment is a loss of a specified amount of good time, this loss shall be tentative until the time when it actually affects consideration for parole at which time it shall be confirmed or modified by the commissioner [7 N.Y.C.R.R. 260.4].

The above procedures are clearly disciplinary in nature and reaffirm the Legislature's purpose of withholding good time allowances as a punishment for offenses against the discipline of the prison.

While there allegedly are basic differences between state prisons and county jails, the State Legislature has nonetheless empowered the county jails to reduce an inmate's definite sentence crediting him with ten days for each month of his sentence for efficient and willing performance of duties assigned to him. A prisoner located at a county jail is credited with good time deduction not only for the time spent after sentence but also for any pre-sentence incarceration. Correction Law, §250. Naturally these regulations apply equally to felons and misdemeants sentenced to a definite term or terms in a county jail. Here it is readily apparent that the State Legislature has deemed the authorities of a county jail to be sufficiently competent to render the commutation of an inmate's sentence and the "purpose, usage and availability of facilities" at the county jails to be sufficient for this purpose. If in fact basic and important differences exist between state prisons and county jails, as appellant suggest, the aforementioned legislative enactment apparently did not deem them to be compelling consideration when considering good time reductions.

A similar situation is presented when an inmate is transferred from a state prison to a reformatory. Correction Law §293. In this event the superintendent of the reformatory assumes all of the powers and duties assigned to the prison "board" by Section 235 of the Correction Law, including the discretionary reduction of their sentence for good conduct and efficient and willing performance of duties assigned. Additionally state prisoners who are transferred from a state prison to

Dannemora or Matteawan State Hospitals, state institutions for mental defectives, likewise receive commutation for good conduct at the same rate as state prison inmates. In this situation, the superintendent or chief officer of the institution performs the acts normally vested in the prison "board". Correction Law, §§ 246, 247. See also, 1934, Op. Atty. Gen. 456. It is quite apparent that the purpose and usage of mental institutions differ substantially from those of a state prison, yet good time reductions in sentence are still allowed.

Even within the state prison system several of the institutions differ in "purpose, usage and availability of facilities," the most noticeable difference existing between the state prisons and the state prison reception centers.[2] For example, the Ossining Correctional Facility (formally referred to as Sing Sing State Prison), presently has very limited facilities for vocational classes or industrial industries as all industrial programs are being terminated, yet inmates received at this institution, inmates who may serve a considerable amount of their sentence there, are still credited with a reduction in their sentences for "good conduct and efficient and willing performance of duties assigned." See, St. of N.Y. Executive Budget for the Fiscal Year April 1, 1970 to March 31, 1971, p. 297.

That good time is granted as an incentive for good conduct is demonstrated in other ways as well. Since 1962 the legislature authorized the statutory release of inmates held for their maximum expiration of sentence

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[2]At the present time three facilities are designated as reception centers for the state prisons: Ossining Correctional Facility, Attica Correctional Facility and Clinton Correctional Facility. [7 N.Y.C.R.R. 100.25 (c)(2); 100.5 (c)(2); 100.15 (c)(2); 103,10.]

by the Parole Board by reducing their maximum term at a rate not to exceed five days for each month of said maximum term. Correction Law §230(4). See, *People ex rel Stark v. Deegan*, 56 Misc. 2d 567, 289 N.Y.S.2d 285 (Supp. Ct., Westchester Co., 1968). On September 1, 1967 the legislature authorized the conditional release of inmates sentenced under the Revised Penal Law and held for their maximum term by the Parole Board at a rate not to exceed ten days for each month of said maximum term. Correction Law, §803. In 1967 by Section 230-a of the Correction Law the right to earn conditional release at a rate of ten days per month of the maximum term was extended to all old penal law inmates who were eligible to earn a reduction of five days per month for statutory release. In all of these instances pre-sentence jail time is included in the computation of a prisoner's good time allowance despite any alleged difference between county jails and state prisons. See, also, *Royster v. McGinnis*, ___F. Supp.___ (S.D.N.Y., January 21, 1971) (Appendix, p. 30a).

Lastly, the legislative intent was readily apparent with the repeal of Section 230(3) [repealed L. 1970, C 476; §45, eff. on the 60th day after May 8, 1970] and the subsequent passage of Sections 803 and 805 of the Correction Law and Sections 70.30 and 70.40 of the Penal Law [added L. 1967; C. 680; §147, eff. September 1, 1967].[3] Under this new statutory scene, good time earned on the minimum sentence is abolished, and presently all prisoners appear before the Parole Board at

[3] The repeal of Section 230(3) limits the scope of this case as the contested law applies only to prisoners convicted of an offense committed prior to September 1, 1967, the effective date of the aforementioned enactments. The class has been further reduced by Chapters 343 & 344 of the Laws of 1972 which added section 212-a.

the expiration of their minimum term[4] notwithstanding the amount of county jail time accumulated prior to sentencing or the amount of good time earned. Good time credit, including good time computed on the period of a prisoner's presentence incarceration, is now deducted from an inmate's maximum term of imprisonment in determining his statutory release date. .Because of these recent changes in the law, the discriminatory practices herein contested no longer exist with regard to prisoners sentenced on offenses committed after September 1, 1967.

For the aforementioned reasons we submit to this Court that whatever differences may exist between the county jails and the state prisons, they are not reasonably related to the purpose of Section 230(3) and consequently should not influence its application. Furthermore, it does not appear that county jails differ significantly from state prisons, at least not to a degree which

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[4] Prior to September 1, 1967 the State Legislature directed the Courts to impose both a minimum and maximum sentence upon indeterminate terms of imprisonment. Former Penal Law, §2189. This provision was amended pursuant to Section 70.00(3)(b&c) of the Revised Penal Law directing that the Court impose a minimum sentence only in unusual circumstances and in such a case the minimum must not exceed one-third of the maximum and the Court must state clearly on the record the reasons for imposing a minimum. In all other situations the minimum is fixed by the State Parole Board in accordance with Section 805(2) of the Correction Law. See, also, 7 N.Y.C.R.R. 1.10. "The purpose of the change is to assure the chance of a substantial period of parole supervision by eliminating the possibility of sentences that do not have an adequate spread between parole eligibility date and maximum expiration date." Penal Law, §70.00(3)(b&c), Practice Commentary.

would justify discrimination against an inmate incarcerated in one institution over the other. It should be recognized that both institutions are under the supervision of the Department of Correction and the Commissioner of Correction. Specifically Section 46(7-a) of the Correction Law [as amd. by L. 1965, Ch. 706 2nd L. 1966, Ch. 413] directs that the State Commission of Correction shall:

> "Promulgate rules and regulations establishing minimum standards for the care, custody, correction treatment, supervision, discipline, and other correctional programs for all persons confined in local correctional institutions. As used in this subdivision, 'local correctional institutions' shall mean and include all county jails. . . ."[5]

It is important to note that this section specifically refers to all persons confined in a local correctional institution and "*charged with or convicted of crime*" (Emphasis added); consequently, the activity of an inmate awaiting trial or sentencing is encompassed by this section.

The Commissioner of Correction is aware of the need for rehabilitative treatment at the local correctional level and has promulgated rules for these institutions [See, 7 N.Y.C.R.R. 5101.1].

The Commissioner has defined correctional treatment on this level as consisting "of any institutional activities or services which would help prisoners develop a more

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[5]For many years prior to the enactment of Section 46(7-a) of the Correction Law, *supra*, the State Commission of Correction has issued minimum standards for the care, custody, supervision and discipline of inmates in county jails in the form of a booklet entitled, *Regulations for the Management of County Jails.* 7 N.Y.C.R.R. 5101.1.

favorable attitude toward authority, better ability to get along with others, and more acceptable ways of making a living" [7 N.Y.C.R.R. 5101(d)(1)]. In instituting any rules or regulations the Commissioner, while recognizing the need for uniformity, mandated that the standards for rehabilitative treatment should not be arbitrary, but should be adaptable to the needs of the prisoners, the physical layout of the institution and personnel available. [7 N.Y.C.R.R. 5101.1(d)(2)].

Pursuant to the Commissioner's directives there are rehabilitative programs in the county jails in the four major areas of recreation programs, libraries, vocational and academic instruction, and counseling and guidance programs. [See, 7 N.Y.C.R.R. 5101.4] Among the Commissioner's rules are regulations governing the good behavior allowances against definite sentences [7 N.Y.C.R.R. 5100.16]. See, also, Penal Law, 70.30(4)(b), and Correction Law, §804], rules governing the discipline of the inmates [7 N.Y.C.R.R. 5100.15], and rules concerning the employment of inmates.[6] Lastly the Commission of Correction oversees

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[6] "... In a county jail although prisoners other than those serving sentence cannot be compelled to work under the law, they may be permitted to do so if they so desire. A certificate to the effect that each such prisoner has volunteered for work assignments should be obtained, dated, witnessed and kept on file...." [N.Y.C.R.R. 5100.14]. The practice in county jails should be compared with that of the state prisons where, between 1968 through 1969, only 3,090 inmates out of the state institution's population of 13,738 inmates were employed in the rehabilitative Correctional Industry. Similarly, out of the same population, only 4,900 inmates were participating in academic courses and only 2,890 inmates were participating in vocational courses. [N.Y. Executive Budget for the Fiscal Year April 1, 1970 to March 31, 1971, p. 292].

the operation of county jails by regularly visiting and inspecting such facilities [7 N.Y.C.R.R. § 51.00.1] and by requiring that annual reports be filed with the Commission by the wardens of county jails and the superintendents of county penitentiaries [7 N.Y.C.R.R. 5100.24].

That rehabilitative facilities are available in county jails is best exhibited by the programs in existence at the Nassau County Jail, the jail where both plaintiff-appellees, Rutherford and Royster, were incarcerated prior to being sentenced. At this institution many programs are available including, *inter alias*, remedial reading courses, academic courses for all levels through high school, college correspondence courses, group therapy for narcotic rehabilitation, various recreational programs, auto mechanics, art classes, music classes, typing classes, creative writing classes, Alcoholics' Anonymous and Gamblers' Anonymous programs and library facilities. *Sheriff's Department, Nassau County, Annual Report, 1970*, pp. 43, 48-51.

All of the aforementioned programs are available to inmates awaiting sentence as well as sentenced inmates (*Id.*). Sentenced inmates, however, received good time reductions on the time spent in pre-sentence incarceration at this institution, while inmates of the same institution who are ultimately sentenced to a term of imprisonment in a state prison do not receive the same consideration. We submit that this different treatment cannot be justified by any difference in "usage, purpose or availability of facilities" between the state prisons and the county jails.

B. The Granting of Good Time Reductions for the Period of Pre-sentence Incarceration Does Not Undermine the Effectiveness of the State Parole Board.

In conjunction with the argument that basic differences exist between state prisons and the county jails, appellants have further presented the argument that a prisoner's minimum release date must be based solely on the personal evaluation of a prisoner's conduct by the State Parole Board while he is actually confined in their custody [Jurisdictional Statement, pp. 10-11; Brief for Appellants, pp. 18-20; 26-27]. Quite apparently the appellants' concern is that the Parole Board needs sufficient time in which to evaluate an inmate's conduct, and that any good time credit computed on the period of a prisoner's pre-sentence incarceration would jeopardize the efficient performance of the Parole Board's duties.

We submit that this argument is without merit for the following reasons. In the first place, the reduction of an inmate's sentence for good conduct does not automatically vest the prisoner with the right to be released into society at an earlier date. Instead the purpose of the computation of a prisoner's sentence, including remission for good time, is to determine when an inmate is allowed to appear before the Parole Board for the first time to be considered for parole. It must be realized at the outset that parole is not granted as a reward for good conduct within the confines of a prison. As the Parole Board itself has stated:

> "An inmate of a correctional institution is not released to parole by the Parole Board merely as a reward for good conduct or efficient performance of duties assigned in the institution. An inmate is

paroled by Board action only if the Board of Parole is of the opinion that there is a reasonable probability that, if the inmate is released, he will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society." *Facts and Figures About the Activities of the Board of Parole and the Division of Parole and Community Services of the New York State Department of Correctional Services* (January 1, 1971 to December 31, 1971) (hereinafter referred to as: *Facts and Figures-Parole Board,*) p. 8. See, also, Correction Law, §213.

In regard to the Parole Board's need for sufficient time to evaluate a prisoner, the granting of good time credit for pre-sentence incarceration has little if any effect on this. Initially, the granting of this good time would only minimally reduce the time before an inmate has his first opportunity to appear before the Parole Board [Appendix, p. 63a-64a]. Once the inmate appears before the Parole Board it will decide whether the inmate has been incarcerated for a sufficient time. Additionally, the Parole Board has the inherent power to refuse to release a prisoner if it is of the opinion that an inmate is not a fit subject for parole or that it has had insufficient time for evaluation.[7] Correction Law, §212, 213; *Royster v.*

[7] This power is exercised quite frequently as exhibited by the following table appearing in *Facts and Figures-Parole Board, supra,* p. 10:

INMATES	1970	1971
Total number appearing at parole hearings	7,950	7,650
Eligible for release to community	5,741	5,901
Number approved for release	3,970	4,152
Percent approved for release	69.2	70.4

McGinnis, supra, ___F. Supp.___. [See, also, Appendix, pp. 63a-64a].

The Three-Judge Court was well aware of this discretionary power vested in the Parole Board, stating that:

> "... The awarding of good time in and of itself in no ways compels the Parole Board to release a prisoner before it has had sufficient time to evaluate him and insure itself of his amenability to parole. Indeed, it is quite possible that, even if a prisoner had been under the careful eye of state prison authorities for the entire period of his incarceration and had earned good time credit throughout such period, the Board might still feel that he should not be released (and, in fact, would not have to release him) at the time of his minimum parole date. Thus, while the Parole Board's actual decision to release a prisoner on parole should certainly be based on adequate personal observation and evaluation by the releasing officials themselves, the mere decision to award a prisoner good time for time spent in county jail need not be so based since the granting of good time (whether for time served in jail *or* prison) is simply not synonymous with actual release from prison—at least in the case of minimum release..." (Appendix, p. 63a-64a).

Appellant's argument appears also to misconstrue the fundamental nature of parole as a vitally important rehabilitative tool. The Parole Board does not operate in a vacuum; instead, it completes a thorough analysis of each individual case brought before it. Section 211 of the Correction Law enumerates specifically the information which the Board of Parole must have before it when considering an inmate. "Some of this information comes to the Board by way of reports from the institution where the inmate is confined. Much of it, however, is in

the form of a parole or classification report prepared by Field Parole Officers in which is presented verified information regarding the inmate's personal and family history, the attitude of the community toward the inmate, and his prospective home and future employment." *Facts and Figures-Parole Board*, supra, p. 14. It is only after this analysis that the Parole Board decides whether or not to release an inmate on parole—a parole that is "intended not to shorten sentences but to make sentencing more effective by discontinuing prison treatment when it no longer corrects, and substituting a supervised and guided life in the everyday world of which the offenders will ultimately become free members."[8] *Facts and Figures-Parole Board*, supra, p. 7.

The limited effect that the granting of good time reduction for pre-sentence incarceration would have upon the Parole Board is further evidenced by other situations which reduce the amount of time in which the Parole Board may evaluate a prisoner's conduct, yet these apparently have not undermined the effectiveness of the Board. For instance, it is uncontested that if a state prisoner is returned to a county jail in connection with court appearances on post-conviction writs of *coram nobis* they are granted good time credit for such county jail time as well (Appendix, p. 68a, fn. 9). Presumably this practice also envisions stays in county jails for other

[8] The Legislature recognized the vital rehabilitative function of parole when it empowered the Parole Board with the duty of fixing the minimum period of imprisonment for an inmate receiving an indeterminate sentence. Penal Law, § 70.00(3)(c). Section 805(2) defines the manner in which such minimum term is determined and also provides that the Parole Board may at any later time reduce this minimum period provided that the period shall in no case be reduced to less than one year. See, also, 7 N.Y.C.R.R. 1.7, 1.8.

post-conviction relief. Similarly, Sections 246, 247 and 66 of the Correction Law provide for the granting of good time credit for the period of time that a prisoner has been transferred to any reformatory, state institution for mental defectives, or work training program. Even though these examples present situations where inmates have been removed from the custody of the Parole Board, good time credit, nevertheless, continues to be granted during the prisoner's absence from state prison.

C. The Three-Judge District Court Correctly Determined the Reasons for Awarding Good Time Reductions.

Appellants further contend that the Three-Judge Court, in failing to accept its proffered justifications, has completely ignored the equal protection standards set forth by this Court and has instead imposed its own standards for determining whether persons receive equal protection under Section 230(3) of the Correction Law by substituting its judgment for that of the New York Legislature [Brief for Appellants, pp. 22-27]. We submit that this proposition is unsound and does not find support in the opinion of the Three-Judge Court.

The Three-Judge Court, correctly delineated its responsibility in a case of this nature by providing:

> " 'It is true that the Equal Protection Clause requires only that the State's action be rationally based and free from invidious discriminations.' *Dandridge v. Williams*, 397 U.S. 471, 487 (1969). Indeed even though a state's practice may be discriminatory and substantially harm those who are the subject of the discrimination, the practice may still be constitutionally permissible if it serves a valid governmental objective. Thus, for example, although

the requirement of bail pending trial substantially discriminates against the indigent defendant, such a classification of 'jail versus bail' is constitutionally sanctioned by the Eighth Amendment as a reasonable means for insuring a defendant's appearance in Court. See, e.g., *Morris v. Crumlish*, 239 F. Supp. 498 (E.D. Pa. 1965). Nevertheless, while laws may create such distinctions and classifications, they must be related to the purposes of the law itself, and artificial distinctions not so reasonably related will not be countenanced" (Appendix, pp. 58a-59a).

Having laid the groundwork for their determination, the Three-Judge Court then conducted a thorough examination of defendant's suggested justifications. Such examination is necessitated by the procedure employed by other courts considering various cases raising questions of equal protection. *Dandridge v. Williams*, supra, 397 U.S. at 482-487; *McGowan v. Maryland*, 366 U.S. 420 (1961); *Palmer v. Thompson*, 403 U.S. 217, 224-225 (1971); *Briggs v. Kerrigan*, 431 F.2d 967 (1st Cir. 1970); *Boddie v. Wynn*, 434 F.2d 1207 (2nd Cir. 1970). As this Court stated in *Cohen v. Hurley* [366 U.S. 117 (1961), rehearing denied, 374 U.S. 857, rehearing denied, 379 U.S. 870]:

"Whatever procedures are fair, what state process is constitutionally due, what distinctions are consistent with equal protection all depend upon the particular situation presented. . . ."

After considering at length the facts before it, the Three-Judge Court analyzed the purported justifications for discrimination among individuals under the purview of Section 230(3) of the Correction Law and, after commenting extensively on these, rejected them as unsubstantiated by the evidence. [Appendix, pp.

60a-64a]. Instead of attempting to 'second-guess' the motivation behind the Legislature's enactment, the Three-Judge Court was concerned with the actual effect of the law as employed within the penal system of this state. Finding that Section 230(3) is used as a disciplinary measure, the Three-Judge Court properly determined that the particular time or place of an inmate's incarceration is irrelevant to a determination of his maximum good time allowance.

II.

THE COURT BELOW PROPERLY TREATED THE CASE AS AN ACTION UNDER THE CIVIL RIGHTS ACT (42 U.S.C. 1981, 1983). APPELLEES WERE NOT REQUIRED TO EXHAUST ANY STATE REMEDIES.

In his argument (Point II Appellant's Brief) the Attorney General urges appellees' action under 42 U.S.C. 1981—The Civil Rights Act, should have been treated as a habeas corpus petition and dismissed for failure to exhaust state remedies. This position is without merit.

Obviously, a petitioner may not circumvent the exhaustion requirements of 28 U.S.C. §2254 by labeling a habeas petition a Civil Rights Action, and the string of cases cited by the appellant support this statement, but by the same token they do not support his argument that this Civil Rights Action was a disguised habeas. *Grayson v. Montgomery*, 421 F.2d 1306 (1 Cir. 1970) involved a challenge to a commitment because of a lack of counsel at a parole hearing. In *Smartt v. Avery*, 411 F.2d 408 (6th Cir. 1979) the plaintiff alleged he was forced to waive his right to appeal and unsuccessfully sought relief under the Civil Rights Act claiming he was not asking for immediate release but only for release if the state did not

offer him an appeal. The 6th Circuit rejected the claim holding the difference claimed was of degree and not kind. In *Bennett v. Allen*, 390 F.2d 788 (9th Cir. 1968) the state prisoner challenged his guilty plea and claimed he was entrapped. *Johnson v. Walker*, 317 F.2d 418 (5th Cir. 1963) was an attack of a state judgment of conviction based upon a claim of an illegal search and seizure. In *Duncombe v. New York*, 267 F. Supp. 103 (S.D.N.Y. 1967) the complaint challenged a state conviction for desecrating the flag and in *Lombardi v. Peace*, 259 F. Supp. 222 (S.D.N.Y. 1966) the plaintiff did not raise a sufficient jurisdictional claim or alternatively set forth allegations which were more properly the subject of a criminal appeal.

In the present action plaintiffs' make no claim with regard to the validity of their state convictions and seek neither release from custody nor redress of civil rights violations incurred during the course of the state criminal proceedings. Indeed, the favorable ruling below secures only an earlier hearing before the Parole Board which still retains the non-reviewable discretion to refuse parole. See, *United States ex rel Cambell v. Pate* 401 F.2d 55, 57 (7th Cir. 1968).[9]

Appellees' motivation in bringing the present action is quite clearly to obtain their ultimate release from custody, albeit, even if it be on parole. But, contrary to the appellant's assertion (Appellant's Brief p. 28) the reason for bringing the action does not control the type of law suit to be brought.

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[9] While in a different setting this case too involved the time a state prisoner had to wait before he appeared before the Parole Board and the 7th Circuit held a claim cognizable under 42 U.S.C.A. 1983 was raised. See, also, *Douglas v. Sigler*, 386 F.2d 684 (8th Cir. 1967).

The claim herein is that appellees' are losing

> "... the possibility that if [they] appeared before the [Parole] Board [they] might persuade it to decide in [their] favor." *United States ex rel Campbell v. Pate*, supra at 57.

This, however, is only a *chance* for qualified freedom and as the Court below pointed out (Opinion below, ft. 7, p. 68a) is distinguishable and hardly the same as cases holding habeas to be the proper remedy where *actual* release from custody is sought. *Rodriguez v. McGinnis*, ___F.2d___ (March 16, 1971); *United States ex rel Katzoff v. McGinnis*, ___F.2d___ (March 29, 1971).

This possible deprivation of rights secured to appellees under the constitution, namely, their right to equal protection of the laws is a cause of action recognized by the Civil Rights Act. *Monroe v. Pape*, 365 U.S. 167, and though appellees are state prisoners they fall within its protection. *Cooper v. Pate*, 378 U.S. 546 and since the remedy provided by the Civil Rights Act:

> "is supplemental to the state remedy, ... the latter need not be first sought and refused before the federal one is invoked." *Monroe v. Pape*, supra at 183.

Appellant also cites *Wilwording v. Swenson*, 404 U.S.___; 30 L. Ed. 2d 418 and *Picard v. O'Connor*[10] 404 U.S.___; 30 L. Ed. 2d 438 to support his position. We think the contrary.

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[10] Picard deals with the failure of a state prisoner to raise with specificity in the state courts the constitutional claim he raised on his federal habeas corpus petition and has no relevance to the present appeal.

In *Wilwording*, a suit challenging living conditions and prison discipline, this Court did indeed hold that habeas corpus was a proper remedy[11] but the Attorney General ignores the second part of the Opinion which holds that petitioner's pleading may also be read to plead a cause under the Civil Rights Act.

It seems clear, then, that any possible extension of habeas jurisdiction by *Wilwording* (See, also, *Johnson v. Avery*, 393 U.S. 483) was not at the expense of the jurisdiction of the Federal Courts under the Civil Rights Acts.

Appellees set forth claims cognizable under the Civil Rights Act; their action was, therefore, properly brought for though state prisoners they are not held to any stricter standard of exhaustion than other Civil Rights plaintiffs. *Wilwording v. Swenson*, supra; *Houghton v. Shober*, 392 U.S. 639.

CONCLUSION

James Royster and Percy Rutherford, individually and on behalf of all persons similarly situate, plaintiffs-appellees, have herein established that the District Court correctly determined that the denial of good time reductions upon a New York State prisoner's period of pre-sentence incarceration contravenes and is in violation of the Equal Protection of the Laws Clause of the Fourteenth Amendment to the Constitution of the

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[11]The Court also held defendant had satisfied the exhaustion requirement even though petitioner had not invoked various state alternatives to obtain relief on the theory that (1) these alternatives were conjectural and (2) the lack of probability of relief in the state courts.

United States, and that the plaintiffs-appellees presented before this Court a cognizable claim under the Civil Rights Act, and respectfully pray the decision of the United States District Court, for the Southern District of New York, be affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

Sup. Ct. Court, U.
FILE
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MICHAEL RODAK, JR.

No. 71-718

PAUL D. MCGINNIS, Commissioner of Correction, State of New York, HARRY FRITZ, Warden, Auburn Prison, Auburn, New York, J. L. CASSCLES, Warden, Ossining Correctional Facility, Ossining, New York,

Appellants,

against

JAMES ROYSTER, PERCY RUTHERFORD and all other persons similarly situated,

Appellees.

REPLY BRIEF

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IN THE

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REPLY BRIEF

ARGUMENT

The three-judge court below incorrectly analyzed the nature of the good behavior allowances awarded pursuant to Section 230(3) of the Correction Law.

1. The Awarding Of Good Behavior Time Is Not Solely A Punitive Disciplinary Device

Appellees claim that the regulations of the Department of Correctional Services show that good behavior time is a punitive device for disciplining a prisoner. They set forth a series of regulations relating to adjustment committees and superintendent proceedings that may result in

a loss of a specific period of good behavior allowance for serious instances of inmate misbehavior. 7 N.Y.C.R.R. Parts 251, 252 and 253 [Brief for Appellees, pp. 9-10]. They therefore argue that it does not matter in what type of institution a prisoner is confined, if the only objective in the awarding of good behavior credit is to maintain prison discipline.

However, the fact that good time can be lost for misbehavior does not mean that the awarding of good time is solely or even primarily related to good or bad conduct apart from any considerations of participation in a full prison program. The regulations of the Department of Correctional Services now specifically spell out exactly what is entailed in the awarding of good behavior time, and show that the institutional programs are very important in determining awards of good time.

7 N.Y.C.R.R. 260.1(a) states that "[T]he opportunity to earn good behavior allowances offers inmates a tangible reward for *positive efforts* made during incarceration" (emphasis added). Section 260.3 sets forth the criteria for awarding allowances and states:

> "(b) In evaluating the amount of allowance to be granted, the statutory criteria (i.e. good behavior, efficient and willing performance of duties assigned, progress and achievement in an assigned treatment program) shall be viewed in the light of the following factors:
>
> (1) The attitude of the inmate;
>
> (2) The capacity of the inmate; and
>
> (3) The efforts made by the inmate within the limits of his capacity."

These factors are evaluated by a time allowance committee, whose purpose is to make recommendations to the

superintendent as to the amount of good behavior allowance to be granted to inmates who are eligible to be considered for such allowance. 7 N.Y.C.R.R. 261.2. The time allowance committee awards good time on the following criteria [7 N.Y.C.R.R. 261.3]:

> "(d) *The committee shall consider the entire file of the inmate* and shall interview the inmate and then shall decide upon a recommendation as to the amount of good behavior allowance to be granted, *applying the principles set forth in sections 260.3 and 260.4 of this Part.*
>
> (e) *The committee* shall not recommend the granting of the total allowance authorized by law or the withholding of any part of the allowance in accordance with any automatic rule, but *shall appraise the entire institutional experience of the inmate* and make its own determination." (Emphasis added)

The time allowance committee meets each inmate at 3-year intervals or prior to the time the inmate is eligible to meet the parole board or to be released conditionally. 7 N.Y.C.R.R. 261.3(a) and (b).

It is thus clear that good time is awarded for more than the avoidance of bad conduct, but encompasses "the entire institutional experience of the inmate." Indeed, if good time is deducted for inmate misbehavior, the inmate may still be re-credited with this time at the time he is eligible for parole if the time allowance committee finds his subsequent behavior, as defined in 261.3(d) and (e), merits restoration of credit. Section 261.3(g).

All of this points out the relationship between good conduct and willing performance of duties, and shows that the awarding of good time is not solely a disciplinary device that can be applied indiscriminately between the totally different institutional settings of state correctional facili-

ties and county jails. The regulations set forth the need for close evaluation of an inmate's attitude, capacity and efforts in all aspects of his institutional experience. This not only emphasizes the necessity of evaluation by state personnel, but shows the importance of viewing the overall performance of an inmate in a full correctional program apart from any considerations of good or bad conduct in a punitive sense. Since the full correctional programs of state prisons cannot even begin to be compared with the purely custodial functions of county jails, the awarding of good time based on efforts for participation in these programs can reasonably differ.

2. State Prisons Are Totally Different From County Jails

Appellees assert, for the first time, that "it does not appear that county jails differ significantly from state prisons. . . ." [Appellees' Br., p. 14]. It is strange that they have waited until the filing of their brief on the merits in this Court to make this assertion, as they never alleged this in their complaint and never before challenged the affirmation of appellants that state prisons differed from county jails in purpose, usage and availability of facilities. [See Complaint, Appendix, pp. 5a-9a; Affidavit of Deputy Commissioner John R. Cain, Appendix, p. 19a]. Indeed, in the absence of any allegation whatever to the contrary, the three-judge court did not even consider this to be an issue and decided the case on the assumption that county jails were primarily detention centers that lacked the programs and services offered in state prisons [Appendix, p. 59a]. Appellees now attempt to show that county jails have programs similar to that of state prisons. Their purported demonstration of this assertion has little to do with the issues in this case.

It is true, as appellees argue, that the State Commissioner of Correction has promulgated guidelines for rehabilitative programs at county jails (Appellees' Br., pp.

15-17). See 7 N.Y.C.R.R. Part 5101. However, these are only guidelines and they do not reflect the reality of the conditions of the county jails. The guidelines, first enacted in July 1, 1968, explicitly admit that previous rehabilitative efforts have been minimal. 7 N.Y.C.R.R. § 5101.1(a) sets forth the background of these efforts and states that "[T]he dimension of treatment has hitherto been a largely neglected phase in local penal operations." One of the reasons for this neglect was "the high number of detention prisoners." The regulation continues [7 N.Y.C.R.R. § 5101.1(b)]:

> "The idleness which has been found existent in most county institutions is likewise not a new discovery and despite efforts made over the years by individuals and groups conversant with such problems, no concerted efforts have been made to propose a practical and effective remedy."

The State has recognized the inadequacy of programs in county jails and is cooperating with local officials to alleviate them. However, the rehabilitative programs listed in 7 N.Y.C.R.R. § 5101.4 are merely goals that "can be implemented." Appellees' citing of a 1970 report listing programs now available in the Nassau County Jail [Appellees' Br., p. 17] shows a commendable effort on the part of Nassau County officials to end the characteristic idleness of pretrial detainees, but it has no relevance to the class represented by appellees, which consists of inmates with pre-1967 convictions.* None of the named plaintiffs alleged they participated in any rehabilitative programs prior to sentencing (see Complaint, Appendix, pp. 5a-9a), and, in view of the language of 7 N.Y.C.R.R.

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* Appellee Rutherford was incarcerated in the Nassau County Jail from March to November, 1966. Appellee Royster was incarcerated in the Nassau County Jail from April 1965 to May 1966 [Appendix pp. 18a, 21a].

§ 5101.1, which was enacted in 1968, it is doubtful if any such programs existed in 1966.**

Appellees have not presented in any court a single instance of a member of their class having participated in any program in a county jail to even raise an issue of fact. While people convicted of misdemeanors may have fully served their time in county jails and received good time credit for pre-sentence confinement on their definite sentences, this does not mean that they participated in any

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** The pre-1967 conditions in local institutions for confinement of pretrial detainees is best illustrated by the conditions in New York City, which supplies the bulk of New York's state prison population and which in 1966 admitted to its detention facilities 77,502 inmates. 1967 Annual Report, The City of New York Department of Correction, p. 9. The 1965 summary report of eleven years progress, published by the Department itself, presents a bleak picture of the local detention centers. See "Progress Through Crisis, 1954-1965", The City of New York Department of Correction. This document reported that severe overcrowding resulted in the use of potential rehabilitation, treatment and recreational quarters for housing (*Id.* at p. 25), and concluded that an underpaid, undermanned staff and a paucity of equipment, resources and facilities prevented the formation of any adequate rehabilitation programs (*Id.* at p. 49). As the capital construction report noted (*Id.* at 373):

> "In all our detention quarters, however, full utilization of educational, therapeutic and recreational opportunities still awaits the day of adequate staff and facilities, and the budget to supply them."

The 1967 Annual Report presents the same picture. This report stated (1967 Report, p. 8):

> "Each of our detention facilities are seriously overcrowded, requiring the doubling up on inmates in areas originally built to house one individual. In the various detention facilities the rate of occupancy has been up to 180% of capacity during 1967."

The situation has become so acute that the Legislature has authorized the State Commission of Correction to lease to any city or county parts of state facilities to house locally held inmates. Correction Law, Section 28 (formerly Section 6-g, added L. 1966, ch. 651).

rehabilitation programs either.* As appellants have noted, the good time awarded for penitentiary and county jail inmates who are actually serving definite sentences is off the maximum (there is no minimum on definite sentences), and the Legislature has determined that the need for supervision and participation in full correctional programs of misdemeanants and other lesser violators is not that essential to mandate the sensitive pre-release evaluation required of felons. Correction Law, §§ 230(3); 250 [Appellants' Br., p. 20, fn.].

Appellees also note that good time is awarded to members of their class who are transferred to state reformatories or state hospitals for the criminally insane. It is difficult to see how this diminishes the validity of Section 230(3). These are two classes of inmates who have been transferred to state institutions that have programs specifically designed for their specialized needs. Willing participation and performance in these treatment programs, under state supervision, would certainly call for the awarding of good time. What is at issue is not a difference in programs between state institutions, but the unavailability of any such programs for pre-trial detainees

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* The Legislature indicated its awareness of the lack of rehabilitative facilities in county jails by actually *reducing* the amount of good time that could be earned in county jails. Under the new Penal Law effective September 1, 1967, definite sentence prisoners in county jails can earn good time up to one-sixth of their maximum sentence [Penal Law, § 70.30(4)(b)] as opposed to their previously being able to earn good time up to one-third of that maximum [Correction Law, § 230(2)]. The Practice Commentary following Section 70.30 sets forth the rationale for this lesser allowance in part as follows [McKinney's Revised Statutes Book 39, Penal Law §§ 1.00 to 219 (1967 Ed.), p. 145]:

> "(2) in order to earn the ten day allowance in a state prison the inmate must render satisfactory performance measured by a number of criteria, *while a county institution inmate usually receives the total allowance for sitting quietly in his cell.*" (Emphasis added).

in county jails. Nor is there any significance to appellees' claim that inmates initially received immediately after sentence in a state reception center do not participate in a full prison program. These centers are used for orientation prior to a determination being made as to where an inmate will be sent to serve his sentence. This orientation could be perhaps the most important determinant of an inmate's success in prison, and willing participation in the orientation program certainly can be evaluated and rewarded by the state. Appellees have thus not produced any significant facts to show that time spent in a county jail is equivalent in any manner to time spent participating in a full state correctional program.

Since state prisons are different from county jails in usage, facilities and purposes, there is a rational basis for differences in awarding good behavior time. Appellees' suggestion that the Parole Board's consideration of pre-minimum sentence release can alleviate some of the problems of inmate evaluation [Appellees' Br., pp. 18-22] fails to recognize that the Legislature did not intend that the Parole Board be *allowed* to exercise its discretion until after a prescribed minimum amount of state supervision had occurred [See Appellants' Br., p. 26]. Appellees are thus trying to substitute their judgment for that of the Legislature in an attempt to persuade this Court to enforce what to them is a wiser state correctional scheme. The courts cannot second guess state legislatures. Given the rational basis for the statutory distinctions at issue, there is no constitutional violation in the State's enforcement of Section 230(3).

CONCLUSION

For all the foregoing reasons, the decision below should be reversed.

Dated: New York, New York, October 3, 1972

Respectfully submitted,

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(Slip Opinion)

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

McGINNIS, COMMISSIONER OF CORRECTION OF NEW YORK, ET AL. *v.* ROYSTER ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 71-718. Argued December 11, 1972—Decided February 21, 1973

Appellees challenge as violative of equal protection § 230 (3) of the New York Correction Law, which denies certain state prisoners good-time credit toward parole eligibility for the period of their presentence county jail incarceration, whereas those released on bail prior to sentence received under the statute full allowance of good-time credit for the entire period of their prison confinement. A three-judge District Court, viewing the good-time statutory scheme as primarily aimed at fostering prison discipline, upheld appellees' claim on the basis that there is no rational basis for the statutory distinction between jail and non-jail defendants in awarding good-time credit. *Held:* Under the New York scheme good-time credit takes into account a prisoner's performance under the program of rehabilitation that is fostered under the state prison system, but not in the county jails, which serve primarily as detention centers. Since the jails have no significant rehabilitation program, a rational basis exists for declining to give good-time credit for the pretrial jail-detention period; and the statute will be sustained even if fostering rehabilitation was not necessarily the primary legislative objective, cf. *South Carolina* v. *Katzenbach*, 383 U. S. 301, 331; *Dandridge* v. *Williams*, 397 U. S. 471, 486. Pp. 5–14.

332 F. Supp. 973, reversed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, BLACKMUN, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion, in which MARSHALL, J., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 71-718

Paul D. McGinnis, Commissioner of Correction, State of New York, et al., Appellants, *v.* James Royster et al.	On Appeal from the United States District Court for the Southern District of New York.

[February 21, 1973]

MR. JUSTICE POWELL delivered the opinion of the Court.

The question before us concerns the constitutionality of § 230 (3) of the New York Correction Law which denied appellee state prisoners "good time" credit for their presentence incarceration in county jails.[1] Appellees

[1] Section 230 (3):

"In the case of a definite sentence prisoner, said reduction shall be computed upon the term of the sentence as imposed by the court, less jail time allowance, and in the case of an indeterminate sentence prisoner, said reduction shall be computed upon the minimum term of such sentence, less jail time allowance. No prisoner, however, shall be released under the provisions hereof from a state prison until he shall have served at least one year. In the case of a prisoner confined in a penitentiary, said reduction shall be computed upon the term of the sentence as imposed by the court, including jail time allowance. Subject to the rules of the commissioner of correction, the maximum reduction of ten days in each month, may, in the discretion of the board hereinafter provided for, be in whole or in part withheld, forfeited or cancelled, in accordance with the rules of

claim that disallowing such credit to them while permitting credit up to the full period of ultimate incarceration for state prisoners who were released on bail prior to sentencing deprived them of equal protection of the laws. The three-judge District Court, one judge dissenting, upheld their claim, 332 F. Supp. 973 (1971). The State appealed and we noted probable jurisdiction, 405 U. S. 986 (1972).[2]

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the commissioner of correction for bad conduct, violation of prison rules or failure to perform properly duties assigned."

Other relevant sections read as follows:

Section 230 (2):

"Every prisoner confined in a state prison or penitentiary, except a prisoner sentenced for an indeterminate term having a minimum of one day and a maximum of his natural life, may receive, for good conduct and efficient and willing performance of duties assigned, a reduction of his sentence not to exceed ten days for each month of the minimum term in the case of an indeterminate sentence, or of the term as imposed by the court in the case of a definite sentence. The maximum reduction allowable under this provision shall be four months per year, but nothing herein contained shall be construed to confer any right whatsoever upon any prisoner to demand or require the whole or any part of such reduction."

Section 230 (4):

"Every prisoner confined in an institution under the jurisdiction of the state department of correction for an indeterminate term, except a prisoner sentenced for a term having a maximum of natural life, may receive, for good conduct and efficient and willing performance of duties assigned a reduction of his sentence not to exceed two days for each month of the maximum term. For meritorious progress and achievement in a treatment program to which he has been assigned, following appropriate testing and classification such prisoner may also receive a reduction of his sentence not to exceed three additional days for each month of the maximum term. In no event, however, shall the maximum reduction allowable under this subdivision exceed two months for each year of the maximum sentence, nor shall any such reduction be calculated under this subdivision to reduce the time actually served to a term less than the minimum sentence imposed by the court. . . ."

[2] The State claims in its brief that the court below should have

The challenged New York sentencing system is a complex one, and some basic definitions are required at the outset. *Jail time* denotes that time an individual passes in a county jail prior to trial and sentencing. *Good time* is awarded for good behavior and efficient performance of duties during incarceration. Both good time and jail time figure variously in the calculations of a series of release dates which each prisoner receives upon his arrival at state prison. Each inmate has both a *minimum parole date*, which is the earliest date on which he *may* be paroled at the discretion of the Parole Board, and a *statutory release date* which is the earliest date he *must* be paroled by the Parole Board.[3] The minimum parole date is calculated under §§ 230 (2) and 230 (3) by subtracting the greatest amount of good time that can be earned (10 days per month) from the *minimum* sentence of an indeterminate term.[4] The statutory release date is calculated under § 230 (4) by subtracting the greatest amount of good time that can be earned (5 days per month) from the *maximum* sentence of an indeterminate term.

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treated the instant case, not as a class action, Fed. Rule Civ. Proc. 23, but as a petition for habeas corpus with the attendant requirement that appellees exhaust their state remedies. Appellant's Brief, p. 2. Appellants did not, however, raise this question in their jurisdictional statement, and did not argue it before the Court. In light of this, it becomes unnecessary to comment further on any possible exhaustion question.

[3] He also has a maximum expiration date which is the date of the maximum sentence to which an inmate can be held if he receives no good time credit at all. This date, unlike the other two, bears no direct relevance to the instant case.

[4] Both prisoners here were sentenced to indeterminate terms. See § 230 (1):

". . . A sentence to imprisonment in a state prison having minimum and maximum limits fixed by the court or the governor is an indeterminate sentence."

Although appellees did receive jail time credit for the period of their presentence incarceration in county jail, § 230 (3) explicitly forbids, in calculating the *minimum parole date*, any good time credit for the period of county jail detention served prior to transfer to state prison.[5] Appellee Royster, being unable to post bail, served 404 days jail time in the Nassau County Jail prior to his transfer to state prison to serve consecutive 5-to-10-year terms for burglary in the third degree and grand larceny in the first degree. Appellee Rutherford also failed to make bail and spent 242 days jail time in Nassau County Jail prior to his trial, sentencing and transfer to state prison for concurrent terms of 10 to 20 years for robbery in the first degree and two and one-half to five years for grand larceny in the second degree. It is undisputed that, were appellees Royster and Rutherford to receive good time credit for their presentence confinement in county jail, they would be entitled to appear before the Parole Board approximately four and three months earlier respectively than under the computation required by § 230 (3).[6]

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[5] As the court below noted:

"There is no doubt that by its express wording Section 230 mandates the denial of good time credit for the time plaintiffs served in county jail awaiting trial and sentencing. Subsection 2 thereof provides that a state prisoner may receive, 'for good conduct and efficient and willing performance of duties assigned, a reduction of his sentence not to exceed ten days for each month of the minimum term in the case of an indeterminate sentence . . . ,' and subsection 3 states that 'in the case of an indeterminate sentence prisoner said reduction shall be computed upon the minimum term of such sentence, *less jail time allowance*' [emphasis added]." 332 F. Supp., at 974–975.

[6] The court below correctly noted:

"that the statutory scheme of § 230, which is the subject of this lawsuit, is no longer the law in New York. On September 1, 1967,

Two additional points merit mention. While New York does deny good time credit for jail time in computing the minimum parole date under §§ 230 (2) and (3), it allows such credit in calculating the statutory release date under § 230 (4).[7] Finally, § 230 (3) itself provides that good time credit for jail time shall be awarded to those prisoners confined after sentence in county penitentiaries, as opposed to those convicted of felonies, such as appellees, who are transferred after sentence to state prison.[8]

I

Section 230 (3) of the New York Correction Law does, as appellees note, draw a distinction "between the treatment of state prisoners incarcerated prior to sentencing

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§ 230 was replaced by §§ 803 and 805 of the Correction Law and §§ 70.30 and 70.40 of the new Penal Law which sections apply to all convictions for offenses committed *on or after that date* (but not to convictions—as of plaintiffs herein—for offenses committed *prior to* the effective date).

"Thus, the scope of this case (and of the proposed class) is necessarily limited, for the challenged statute, § 230 (3) of the Correction Law, now applies only to those prisoners who were convicted for offenses committed before September 1, 1967, whose minimum terms have not yet expired, who have not yet met with the Parole Board, and who have not yet elected the 'conditional release' program offered by the new law and made available to old law prisoners by § 230a of the Correction Law. Of these prisoners, a smaller class yet—comprised of those inmates who served time in county jail prior to sentence to state prison—actually feel the effect of § 230 (3)'s proscription against good time credit for jail time. Nevertheless, the briefs in this case attest to the continuing effect of that mandate on a substantial number of individuals." 332 F. Supp., at 975.

[7] See *People* v. *Deegan*, 56 Misc. 2d 567, 289 N. Y. S. 2d 285 (Sup. Ct., Westchester County, 1968); *Paul* v. *Warden of the Suffolk County Jail* (New York Law Journal, May 21, 1969, at p. 18, col. 6).

[8] "In the case of a prisoner confined in a penitentiary, said reduction shall be computed upon the term of sentence as imposed by the court, *including jail time allowance.*" (Emphasis added.)

and those who were not similarly incarcerated."[9] Appellees contend that "denying state prisoners good time credit for the period of their pre-sentence incarceration in a County Jail whereas those fortunate enough to obtain bail prior to sentence received a full allowance of good time credit for the entire period which they ultimately spend in custody"[10] violates equal protection of the laws and discriminates against those state prisoners unable to afford or otherwise qualify for bail prior to trial.

We first note that any relative disadvantage the distinction works on appellees is lessened by the fact that New York on September 1, 1967, replaced § 230 of its Correction Law with §§ 803 and 805 which apply to all convictions for offenses after that date. Under the new scheme "good time earned on the minimum sentence is abolished. A prisoner meets with the Parole Board at the expiration of his minimum term regardless of how much good time he has earned or of how much time he spent in jail prior to arriving at state prison."[11] New York has given appellees—and all those sentenced for offenses committed prior to September 1, 1967—a chance to elect the new procedure, but appellees declined to do so. Appellees thus enjoy at least as favorable a position as all state prisoners convicted for offenses committed subsequent to September 1, 1967, including those released on bail prior to sentence. Appellees thus are disadvantaged in the computation of time only in comparison with those who were convicted of offenses committed prior to September 1, 1967, and made bail prior to trial. Even the adverse impact of this difference is lessened, though not eliminated, by the fact that New York did not deprive appellees of credit for the full amount of

[9] Appellee's Brief, p. 5.
[10] *Id.*, pp. 5–6.
[11] Appellant's Brief, p. 12.

actual time spent in jail prior to trial and sentencing but only of the potential *additional* 10 days per month of good time ordinarily available under § 230 (2) to inmates for good conduct and efficient performance of duty.[12]

We note further that the distinction of which appellees complain arose in the course of the State's sensitive and difficult effort to encourage for its prisoners constructive future citizenship while avoiding the danger of releasing them prematurely upon society. The determination of an optimal time for parole eligibility elicited multiple legislative classifications and groupings, which the court below rightly concluded require only some rational basis to sustain them. *James* v. *Strange*, 407 U. S. 128, 140 (1972); *Lindsey* v. *Normet*, 405 U. S. 56, 73–74 (1972); *Schilb* v. *Kuebel*, 404 U. S. 357 (1971); *Dandridge* v. *Williams*, 397 U. S. 471, 487 (1969). Appellees themselves recognize this to be the appropriate standard.[13] For this Court has observed that "the problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific." *Metropolis Theatre Co.* v. *City of Chicago*, 228 U. S. 61, 69–70 (1913). We do not wish to inhibit state experimental classifications in a practical and troublesome area, but inquire only whether the challenged distinction rationally furthers some legitimate, articulated state purpose. We conclude that it does.

II

The State defends the distinction by noting that "state prisons differ from county jails with respect to purpose, usage and availability of facilities." State pris-

[12] As noted above, this would make a difference of three and four months, respectively, in the time appellees Rutherford and Royster were eligible to appear before the Parole Board.

[13] Tr. of Oral Arg., at 30.

ons are "intended to have rehabilitation as a prime purpose and the facilities at these institutions are built and equipped to serve this purpose." The State cites the presence at state prisons of "educational and vocational services such as schools, factories, job training programs and related activities." [14] At argument the State noted: "We have barber shops. We teach trades. We manufacture a lot of goods. . . . Greenhaven State Prison has a textile factory." [15]

We pass no judgment on the success or merits of the State's efforts, but note only that at state prisons a serious rehabilitative program exists. County jails, on the other hand, serve primarily as detention centers. The State asserts they are "neither equipped nor intended to do anything more than detain people awaiting trial and maintain no schools, run no factories and require no work from these inmates." [16] While appellees do point to the existence of some rehabilitative or recreational facilities within some county jails,[17] it is clear that nothing comparable to the State's rehabilitative effort exists.

These significant differences afford the basis for a different treatment within a constitutional framework. We note that the granting of good time credit toward parole eligibility takes into account a prisoner's rehabilitative performance. Section 230 (2) of the New York Correction Law authorizes such credit against the minimum parole date "for good conduct *and efficient and willing performance of duties assigned* [emphasis added]." [18] The regulations of the New York Department of Correc-

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[14] Appellant's Brief, p. 14.

[15] Tr. of Oral Arg., p. 13.

[16] Appellant's Brief, p. 15.

[17] Appellee's Brief, p. 17. But the State notes that "some counties have absolutely nothing. Some have a little something." Tr. of Oral Arg., p. 6.

[18] See n. 1, *supra*.

tion, 7 N. Y. C. R. R. 260.1 (a), state that: "The opportunity to earn good behavior allowances offers inmates a tangible reward for *positive efforts* made during incarceration [emphasis added]." [19] As the statute and regulations contemplate state evaluation of an inmate's progress towards rehabilitation, in awarding good time,[20]

[19] The State further notes that:

"Section 260.3 sets forth the criteria for awarding allowances and states:

"'(b) In evaluating the amount of allowance to be granted, the statutory criteria (i. e. good behavior, efficient and willing performance of duties assigned, progress and achievement in an assigned treatment program) shall be viewed in light of the following factors:

"'(1) The attitude of the inmate;

"'(2) The capacity of the inmate; and

"'(3) The efforts made by the inmate within the limits of his capacity.'

"These factors are evaluated by a time allowance committee, whose purpose is to make recommendations to the superintendent as to the amount of good behavior allowance to be granted to inmates who are eligible to be considered for such allowance. 7 N. Y. C. R. R. 261.2. The time allowance committee awards good time on the following criteria [7 N. Y. C. R. R. 261.3]:

"'(d) *The committee shall consider the entire file of the inmate* and shall interview the inmate and then shall decide upon a recommendation as to the amount of good behavior allowance to be granted, *applying the principles set forth in sections 260.3 and 260.4 of this Part.*

"'(e) *The committee* shall not recommend the granting of the total allowance authorized by law or the withholding of any part of the allowance in accordance with any automatic rule, but *shall appraise the entire institutional experience of the inmate* and make its own determination.' [Emphasis added]." Appellant's Reply Brief, pp. 2-3.

[20] See also the affidavit of the Deputy Commissioner in the Department of Correction, John R. Cain who stated that:

"The actual allowance of 'good time' is discretionary and is awarded as an incentive for good conduct. It is a means for encouraging participation in programs, efficient work and discipline.

"The state correctional system seeks to encourage rehabilitation by work participation by inmates, job training programs and educa-

it is reasonable not to award such time for pretrial detention in a county jail where no systematic rehabilitative programs exist and where the prisoner's conduct and performance are not even observed and evaluated by the responsible state prison officials. Further, it would hardly be appropriate for the State to undertake in the pretrial detention period programs to rehabilitate a man still clothed with a presumption of innocence. In short, an inmate in county jail is neither under the supervision of the State Correction Department nor participating in the State's rehabilitative programs. Where there is no evaluation by state officials and little or no rehabilitative participation for anyone to evaluate, there is a rational justification for declining to give good time credit.[21]

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tion programs. An inmate can be evaluated in his work and participation in the facility's programs and 'good time' granted as an incentive. Prior to being received in the facility, however, an inmate who is in jail is not under the supervision of the State Correction Department and is not involved in the facility program. Since the inmate is not participating in the state programs while in jail there is no opportunity to evaluate him nor need to encourage his participation." Appendix 19a.

[21] The state further correctly notes:

"In fact, until recently changed by federal policy, the federal prison system itself did not require the awarding of good time for pre-trial incarceration under 18 U. S. C. § 4161, which awards good time solely for good behavior. Section 4161 states that good time begins to run 'with the day on which the sentence commences to run', and the sentence does not start to run until the prisoner is received in a federal penitentiary. See *Blackshear* v. *United States*, 434 F. 2d 58 (5th Cir. 1970). The federal courts have uniformly upheld the denial of the opportunity to earn good time on this jail time. *Bandy* v. *Wilmington*, 398 F. 2d 333 (10th Cir. 1968), *cert. den.* 393 U. S. 1006; *Aderhold* v. *Ellis*, 84 F. 2d 543 (5th Cir. 1936), *cert. den.* 299 U. S. 587; *Swope* v. *Lawton*, 83 F. 2d 814 (9th Cir. 1936)." Appellant's Brief, p. 20–21.

III

We do not agree with the court below that the integrity of the State's assertions as to rehabilitation is undermined by the fact that the State does grant under § 230 (3) good time credit for presentence jail time to county penitentiary inmates and under § 230 (4) to state prisoners for the purpose of calculating their statutory release dates.[22] The legislature could have concluded rationally that *county* penitentiary inmates, who are nonfelons with less than one year sentences, required quantatively and qualitatively less rehabilitation—with fewer risks of misevaluation—than in the case of inmates confined to state prison for more serious crimes. And the legislature could rationally have distinguished between the minimum parole date and the statutory release date on the ground that an acceleration of the minimum parole date posed a greater danger that an inmate would be released without adequate exposure to rehabilitative programs and without adequate evaluation by prison officials. Thus New York's decision to deny good time credit for presentence jail time solely with respect to a state prisoner's minimum parole date is rationally justified on the grounds that the risk of prematurely releasing unrehabilitated or dangerous criminals may well be greatest when the parole decision is made prior to expiration of the minimum sentence.

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[22] See p. —, *supra*, and nn. 6 and 7. The court below stated: "Whatever the merit in defendant's attempted distinction, the fact remains that state prisoners can be, and, under certain circumstances are, granted good time credit for jail time for reasons other than as a reward for participation in the various rehabilitative programs of the state prison system. The awarding of good time for jail time to these two classes of prisoners only reinforces the belief that the legislature's primary aim in enacting the good time statute was to foster and insure the maintenance of prison discipline." 332 F. Supp., at 978.

IV

Neither appellees nor the court below contended that increased opportunity for state evaluation of an inmate's behavior and rehabilitative progress was not a purpose of the challenged provision of § 203 (3). Appellees state only that the rehabilitative purpose was not the "overriding" one,[23] and the District Court noted that "the legislature's *primary* aim in enacting the good time statute was to foster and insure the maintenance of prison discipline." 332 F. Supp., at 978 (emphasis added).[24]

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[23] At oral argument the following instructive colloquy occurred:

"Q. Then it is your position that the only purpose at all, sir, by the statute, exclusively, the only single purpose, is the disciplinary one?

"MR. SORGE: Your Honor, it is extremely difficult to say whether the only purpose is just for the discipline. I believe that the court has——

"Q. If a purpose is the rehabilitation one, than are you not in some trouble?

"MR. SORGE: If the main purpose is?

"Q. If a purpose, not the main purpose, a purpose.

"MR. SORGE: I do not believe so, Your Honor, because, as the district court stated, the overriding consideration in this case is disciplinary . . . .

. . . . . .

"Q. You go further then than the district court, I take it, because I read the district court's opinion the same way MR. JUSTICE BRENNAN does, as saying that rehabilitation is a subordinate function and that its opinion is based on that. You say that it really is no function at all?

"MR. SORGE: I believe that if you take the state prisoners themselves, Mr. Justice, there might be a subordinate position. However, I would repeat that the overriding consideration is the disciplinary aspect of it." Tr. of Oral Arg., pp. 28–30.

[24] See also the court's statement that:

"Defendants contend that good time is granted as an incentive to the inmates to participate in these prison rehabilitation programs and that, since county jails are not equipped to provide such serv-

We do not dispute these statements: the disciplinary purpose is certainly an important and possibly the "primary" aim of the legislation.[25] Yet our decisions do not authorize courts to pick and choose among legitimate legislative aims to determine which is primary and which subordinate. Rather, legislative solutions must be respected if the "distinctions drawn have some basis in practical experience," *South Carolina* v. *Katzenbach*, 383 U. S. 301, 331 (1966), or if some legitimate state interest is advanced, *Dandridge* v. *Williams*, 397 U. S. 471, 486 (1970). So long as the state purpose upholding a statu-

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ices, there is no basis for granting good time for time served therein. If it were clear that the awarding of good time was based solely and exclusively on an evaluation of an inmate's performance in such programs so endemic to the state prison system, the denial of good time for jail might be understandable; however, this does not appear to be the case. Rather, it seems that the overriding consideration in the granting of good time reductions is the maintenance of prison discipline." 332 F. Supp., at 977.

[25] The court below noted that the disciplinary purpose of the statute is demonstrated by the fact that "a prisoner is immediately and automatically credited with a maximum allowance of good time credit for *future* good behavior at the time his minimum parole date is initially fixed upon his arrival in state prison. In effect, then, a prisoner does not 'earn' good time credit as time goes on for exemplary performance in assorted prison programs but rather avoids being penalized for bad behavior." The Court then cited § 235 of New York Correction Law providing that good time may be withheld as "'punishment for offenses *against the discipline* of the prison or penitentiary' [emphasis added] . . . ." 332 F. Supp., at 977–978.

The statements above do demonstrate a disciplinary purpose for the statute, but do not negate the rehabilitative one. There is nothing to show that good time credit may not be revoked for failure of the inmate to participate acceptably in the State's rehabilitative program as well as for disciplinary violations. Indeed § 230 (3) requires loss of good time for "bad conduct, violation of the prison rules or *failure to perform properly duties assigned*." (Emphasis added.)

tory class is legitimate and nonillusory, its lack of primacy is not disqualifying.

When classifications do not call for strict judicial scrutiny, this is the only approach consistent with proper judicial regard for the judgments of the Legislative Branch. The search for legislative purpose is often elusive enough, *Palmer* v. *Thompson*, 403 U. S. 217 (1971), without a requirement that primacy be ascertained. Legislation is frequently multipurposed: the removal of even a "subordinate" purpose may shift altogther the consensus of legislative judgment supporting the statute. Permitting nullification of statutory classifications based rationally on a nonprimary legislative purpose would allow courts to peruse legislative proceedings for subtle emphases supporting subjective impressions and preferences. The Equal Protection Clause does not countenance such speculative probing into the purposes of a coordinate branch. We have supplied no imaginary basis or purpose for this statutory scheme, but we likewise refuse to discard a clear and legitimate purpose because the court below perceived another to be primary.

V

As the challenged classification here rationally promotes the legitimate desire of the state legislature to afford state prison officials an adequate opportunity to evaluate both an inmate's conduct and his rehabilitative progress before he is eligible for parole, the decision of the District Court is

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 71-718

Paul D. McGinnis, Commissioner of Correction, State of New York, et al., Appellants, v. James Royster et al.

On Appeal from the United States District Court for the Southern District of New York.

[February 21, 1973]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE MARSHALL concurs, dissenting.

Under § 230 (3) of the New York Correction Law a prisoner loses "good time" as punishment for offenses against the discipline of the prison. The statutory appearance of inmates before a parole board is computed by allowance of up to 10 days for "good conduct" each month under the law governing appellees.[1] No "good time" credit is allowed, however, for the period of their presentence incarceration in a county jail. Thus two prisoners—one out on bail or personal recognizance pending

[1] The statutory scheme of § 230 was replaced by §§ 803 and 805 of the Correction Law and §§ 70.30 and 70.40 of the new Penal Law, which sections apply to all convictions for offenses committed *on or after that date* (but not to convictions—as of appellees—for offenses committed *prior* to the effective date). The challenged statute, § 230 (3) of the Correction Law, now applies only to those prisoners who were convicted for offenses committed before September 1, 1967, whose minimum terms have not yet expired, who have not yet met with the Parole Board, and who have not yet elected the "conditional release" program offered by the new law and made available to old law prisoners by § 230-a of the Correction Law. Of these prisoners, a smaller class yet—comprised of those inmates who served time in county jail prior to sentence to state prison—actually feel the effect of § 230 (3)'s proscription against good time credit for jail time. Nevertheless, the mandate of § 230 (3) affects a substantial number of individuals.

trial and the other confined in jail while awaiting trial—are treated differently when it comes to parole, though each is convicted of the same crime and receives the identical sentence. The result, as the opinion of the Court makes plain, is that appellees are required to wait some months longer before they may appear before the parole board than do those out on bail or on personal recognizance pending trial but sentenced to the same term for the same crime.

The "good time" deduction is not based on progress toward rehabilitation but as an inducement to inhibit bad conduct. That is what the three-judge court held in 332 F. Supp. 973. That construction accurately reflects New York's interpretation of § 230 (3). The court in *Perez* v. *Follette*, 58 Misc. 2d 319, said:

> "The policy underlying the discretionary grant of good time reductions is clear. The attitude and conduct of prisoners should improve if they are offered an incentive for good and productive behavior while at the same time the fact that reductions can be withheld will inhibit bad conduct." *Id.*, at 321.

That discipline—not rehabilitative progress—is the key to "good time" credit is evidenced in another way. Once a prisoner arrives at prison his future "good time" is immediately computed and credited to his sentence. "In effect, then, a prisoner does not 'earn' good time credit as time goes on for exemplary performance in assorted prison programs but rather avoids being penalized for bad behavior." 332 F. Supp., at 978. That is confirmed by § 235 of the New York Correction law:

> ". . . a punishment for offenses against the discipline of the prison or penitentiary is in accordance with the rules herein before mentioned. Reduction credited to a prisoner in the first instance, in his account, by the warden, as provided in Section 230,

shall stand as the reduction allowed, unless withheld wholly or partly by the board as punishment, as above provided."

Moreover, under § 230 (4) of the Act jail time is *not* excluded from the computation of a prisoner's maximum good time allowance from the maximum term of an indeterminate sentence. That is the earliest date on which an inmate *must* be paroled, unlike the one we have here which involves the earliest date on which a prisoner *can* be paroled. But no rational grounds have been advanced for allowing "good time" credit for jail time in one case but not in the other.

The claim that "good time" is correlated to rehabilitative programs that only prisons have is the red herring in this litigation. The District Court exposed the fallacy in that rationale. Since the "good time" credit is to induce good behavior by prisoners while they are confined, the place of their confinement becomes irrelevant. Jail time allowance is allowed those confined in county penitentiaries. § 203 (3). And, as I have said, jail time is credited in computing a prisoner's statutory release date.

It would seem that the "good time" provision in § 230 (3) is used capriciously, since it is allowed in cases not dissimilar to the present one.

After all is said and done, the discrimination in the present case is a statutory one levelled against those too poor to raise bail and unable to obtain release on personal recognizance.[2] See *People* v. *Deegan,* 56 Misc. 2d 567,

[2] The Court in *People* v. *Deegan, supra,* in refusing to infer that § 230 (4) must exclude jail time since § 230 (3) does so, explicitly said: "Adoption of the respondent's interpretation would have the effect of prejudicing a defendant who was unable to raise funds in order to be released on bail, and would deprive him of 'equal protection of the laws' in violation of the 14th Amendment of the United States Constitution. For example, a defendant who was at liberty

289 N. Y. S. 2d 285. That is the real rub in the present case.

In *Paul* v. *Warden*, N. Y. L. J., May 21, 1969, p. 18, col. 6, the Court said:

> "In computing the allowance of 'time off' for good behavior respondent considered only that time served subsequent to sentence as eligible for the allowance. Time served prior to sentence was excluded from the computation. The respondent's computation follows the method suggested by the Department of Correction.
>
> "This court is not in agreement with method employed. It is inequitable in that it discriminates against those persons charged with crime that are able to furnish bail upon arraignment and those remanded as a result of inability to furnish bail.[3]
>
> "The inequity is blatantly apparent in the following cases. Two persons are charged with crimes identical in nature. On arraignment defendant A furnishes bail. A is subsequently sentenced, after a trial resulting in a verdict finding him guilty as charged, to one year in the county jail. Predicated upon his good behavior during the period of his incarceration A would be allowed a reduction of sixty days from the sentence of one year and would serve a total of 305 days. The defendant B, if con-

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on bail prior to judgment, and received a similar sentence, would be subject to a maximum of 16 months, as opposed to 18 months for petitioner who could not afford bail and who languished in jail awaiting sentence. If there is logic or justice in this anomaly it escapes the court." 56 Misc. 2d., at 568.

[3] This loss is real, for "what he is losing . . . is the possibility that if he appeared before the board he might persuade it to decide in his favor. Of course this loss, in practical, human, terms is serious and involves a chance for at least qualified liberty." *Campbell* v. *Pate*, 301 F. 2d 55, 57.

fined for a period of 350 days prior to trial and sentence, and upon sentence was sentenced to confinement for one year would only be entitled to 'time off' for the period served following sentence or one-sixth of fifteen days for a total allowance of two days reduction in sentence despite good behavior during his entire period of imprisonment. B because of inability to furnish bail would thus serve 363 days as compared to the 305 days served by A.

"This court refuses to contenance such disparity and discrimination."

If "good time" were related to rehabilitative progress, I would agree that the law passes muster under the Equal Protection Clause of the Fourteenth Amendment. But since "good time" is disallowed only to those who cannot raise bail or obtain release on personal recognizance, the discrimination is plainly invidious.

We deal here with a deepseated inequity. In New York City as of 1964 49% of those accused were imprisoned before trial while only 40% were imprisoned after conviction.[4] See Wald, Pretrial Detention and

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[4] The Vera Foundation in its Report, The Manhattan Bail Project, observed that "bail is generally a door to pre-trial liberty for the rich, to pre-trial detention for the poor." For the latter, it notes, "poverty is, in fact, a punishable offense." Even those with money may not be able to purchase a bail bond (*id.*, p. 3). "The bondsman is responsible to no one and is subject to no review. He can refuse to write a bail bond whenever he chooses—because he "mistrusts" a defendant, because he dislikes members of a given minority group, or because he got up on the wrong side of the bed. A bail bondsman is not obliged to have valid or sensible reasons." *Id.*, at 3.

The Vera Foundation has a staff that works with the magistrate to see which of those arrested may properly be released on their personal recognizance.

"During the Project's first 30 months in the Manhattan courts,

Ultimate Freedom, 39 N. Y. U. L. Rev., 631 634 (1964). It is poverty that is "generally accepted as the main reason for pretrial detention." *Id.*, at 636. The inequality apparently appears in the end product since ". . . the longer the period of detention before disposition of the case, the greater the likelihood of a prison sentence. . . . The key seems to be the defendant's at-large status at the time of sentencing. The glow of freedom apparently shines through." *Id.*, at 635.

Another sample of 385 defendants showed that 64% of those continuously in jail from arraignment to adjudication were sentenced to prison, while only 17% of the 374 who made bail received prison sentences. Rankin, The Effect of Pretrial Detention, 39 N. Y. U. L. Rev. 641, 643 (1964). Detained persons are more likely to be sentenced to prison than bailed persons regardless of whether high or low bail amounts have been set. *Id.*, at 641.

These studies were made by the Vera Foundation founded by Louis Schweitzer. See Programs in Criminal Justice Reform, Vera Institute of Justice, Ten-Year Report 1961–1971 (1972). That Report states, ". . . people who were too poor to afford bail or private counsel ended up in prison more often than those who could pay." Page 98. And see Ares, Rankin, and Sturz, The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole, 38 N. Y. U. L. Rev. 67 (1963).

2300 defendants were released on their own recognizance upon the recommendation of Vera staff members.

"Ninety-nine per cent of these defendants returned to court when required; only one per cent failed to appear.

"During this same period, about three per cent of those freed on bail failed to appear in court. Thus, it appears that verified information about a defendant's background is a more reliable criterion on which to release a defendant than in his ability to purchase a bail bond." *Id.*, at 6.

The present case is on the periphery of one of the most critical problems in criminal law enforcement.

The important issue involved in this case is not when and whether a prisoner is released. It concerns only the time when the parole board may give a hearing. To speed up the time of that hearing for those rich or influential enough to get bail or release on personal recognizance and to delay the time of the hearing for those without the means to buy a bail bond or the influence or prestige that will give release on personal recognizance emphasizes the invidious discrimination at work in § 230 (3).